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The Supreme Court of the United States

WALTER D. SMALL,
LARRY W. NEPTUNE,
WILLIAM R. HOOGSTRA, AND
ALICE D. LORENZEN,
Petitioners,

v.

UNITED STATES,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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Statement of the Issues

When a federal statute grants authority to the Department of Defense (DoD) to implement a statutory scheme and the Department of Defense formally issues a Directive pursuant to that authority, may courts disregard DoD's Directive as mere policy and accord Chevron deference, instead, to the contrary, unpublished and informal position of a subordinate military department?

Where (1) the statutes at issue in a case (10 U.S.C. §§ 611, 616(c) and 617(a)) are clear on their face; (2) the plain meaning of the statutes is supported by the overall statutory scheme, the legislative history, the published Directive of the agency with primary responsibility, and the practices of other agencies; and (3) there is undisputed evidence that a subordinate agency's non-literal interpretation of the statutes creates significant inequities, is it error to extend Chevron deference to the subordinate agency's non-literal interpretation and to adopt it on grounds of efficiency and equity?

Do Air Force selection boards comply with the requirements of 10 U.S.C. §§ 611, 616, and 617 when it is undisputed that:

a) a majority of the members never see or in any way review anything about the officer candidates who will ultimately be "recommended" as best qualified;

b) a majority of the members never see or in any way review anything about the officer candidates who will ultimately be "found" fully qualified;

c) the scoring procedures do not assure consensus by even as many as three members of a twenty-five-member (or larger) selection board;

d) none of the voting members of the board know the identities of the officers who will be "recommended" as best qualified and "found" fully qualified; and

e) the members' "certification" of the selection board report is not an affirmation of the existence of

majority consensus that the recommended officers are the best qualified?

Did the Petitioners receive an "appeal" that accorded with 28 U.S.C. § 1295 and due process when the Court of Appeals introduced new and unsupported "facts" into the case, which fundamentally misrepresented the Air Force's promotion board process and avoided decision on the undisputed facts of record?

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In the Supreme Court of the United States

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PETITION FOR A WRIT OF CERTIORARI
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Introduction

The promotion board process enacted in the Defense Officer Personnel Management Act [DOPMA], P.L. 96-513, and codified in 10 U.S.C. Chapter 36 "goes to the heart of our national security for it deals with the quality of leadership in our armed services." [1] Congress enacted DOPMA in 1980 to, among other things, "provide uniform laws for promotion procedures for officers in the separate services" and "consolidate[] in one place in the law the existing statutory provisions for ... selection board composition and operation." [2] The Secretary of Defense

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[1] 125 Cong. Rec. S. 1918, 34209 (daily ed. Nov. 30, 1979) (Statement of Sen. Byrd).

[2] H. R. Rep. No. 96-1462, *Defense Officer Personnel Management Act*, 96th Cong., 2d Sess. (1980) at 3, 40.

promulgated Department of Defense Directive [DoDD] 1320.9 (1981) to implement DOPMA. Without basis or foundation in any regulation, the Air Force adopted promotion board procedures that violate the plain language of Title 10, frustrate legislative intent, contravene the implementing mandate of DoDD 1320.9, and are inconsistent with the practices of her sister services – the Army, Navy, and Marine Corps. Under these circumstances, the Court of Appeals erroneously afforded Chevron deference [3] to those unique Air Force procedures as a permissible interpretation of the governing laws.

The right to military pay is a function of statute. 37 U.S.C. § 204; Bell v. United States, 366 U.S. 393 (1961). Active duty personnel have a right to be paid until their entitlement to that pay is properly terminated by a valid separation from active duty. Sanders v. United States, 594 F.2d 804, 810 (Ct. Cl. 1979) (*en banc*). If an officer is not lawfully separated, his entitlement to pay is not extinguished and the Tucker Act (28 U.S.C. § 1491) provides a vehicle for its recovery. Adkins v. United States, 68 F.3d 1317, 1327 (Fed. Cir. 1995). This private right of recovery is the only known mechanism to enforce the statutory and regulatory promotion procedures at issue herein.

Petitioners [4] were involuntarily separated from active duty because they were twice considered but not selected for promotion to the grade of lieutenant colonel. 10 U.S.C. § 632. They claim that their separations were invalid, and that their rights to pay continued, because their non-selections by illegally conducted promotion boards were of no legal effect.

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[3] Chevron U.S.A., Inc., v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984).

[4] Major Walter D. Small was the appellant in Small v. United States, 158 F.3d 576 (Fed. Cir. 1998). Majors Larry W. Neptune, William R. Hoogstra, and Alice D. Lorenzen were the appellants in Neptune v. United States, Fed. Cir. No. 97-5128. Under Supreme Court Rule 12.4, all four join in this *Petition for Writ of Certiorari* because the judgments below are from the same court and involve identical questions of law.

Opinions Below

The Air Force Board for Correction of Military Records (10 U.S.C. § 1552) denied Petitioners' individual applications for administrative relief in decisions that are reproduced in the Appendix at A 71, 86, 113, and 121.

The Court of Federal Claims initially dismissed Small's complaint in a decision that is reported at 36 Fed. Cl. 43 (1996). A 20. That decision was withdrawn on reconsideration and Small's complaint was dismissed on the "slightly different grounds" stated at 37 Fed. Cl. 149 (1997). A 39. Agreeing with Small, the Court of Federal Claims denied Neptune, Hoogstra, and Lorenzen's complaint in Neptune et al. v. United States, 38 Fed. Cl. 510 (1997). A 56.

The Court of Appeals affirmed the dismissal of Small's complaint at 158 F.3d 576 (Fed. Cir. 1998). A 1. On the sole authority of its Small decision, the Court of Appeals summarily affirmed the dismissal of Neptune, Hoostra, and Lorenzen's complaint in Fed. Cir. No. 97-5128. A 13.

Small filed a timely *Petition for Rehearing and Suggestion for Rehearing En Banc* on November 30, 1998. Neptune, Hoogstra, and Lorenzen filed a similar petition and suggestion on December 17, 1998. On March 12, 1999, the Court of Appeals granted Small's rehearing petition for the limited purpose of amending a portion of its reported opinion that is not relevant to this action, but declined the *en banc* rehearing suggestion. A 14-15. The petition and suggestion of Neptune, Hoogstra, and Lorenzen were also rejected on March 12, 1999. A 16.

Jurisdiction

As to Small, the judgment of the Court of Appeals was initially entered on October 14, 1998. As to Neptune, Hoogstra, and Lorenzen, the judgement of the Court of Appeals was initially entered on November 2, 1998. Timely rehearing petitions were filed in each case; each was disposed of on March 12, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Statutes and Regulations

This case involves 10 U.S.C. §§ 611(a), 616(c), and 617(a), which are set forth at A 141. These provisions are the same today as they were at the relevant times. Also involved are Department of Defense Directive 1320.9 (1981) and Air Force Regulation 36-89 (1981), Chapter 2. A 142 and A 147.

Statement of the Case

Petitioners seek review of judgments of the Court of Appeals for the Federal Circuit. The basis for federal jurisdiction in the Court of Federal Claims was 28 U.S.C. § 1491 (the Tucker Act).

1. The Law

The United States Code does not specify *exactly* how officers are to be identified for promotion in each military service. It does, however, establish fundamental prerequisites to be met in all cases. 10 U.S.C. § 611 requires service Secretaries to "convene selection boards to recommend [officers] for promotion." Those boards are to be convened "[u]nder regulations prescribed by the Secretary of Defense." A selection board so convened "may not recommend an officer for promotion unless – (1) the officer receives the recommendation of a majority of the members of the board; and (2) a majority of the members of the board finds that the officer is fully qualified for promotion." 10 U.S.C. § 616(c). Once its work is complete,

> Each selection board convened under §611(a) of this title shall submit to the Secretary of the military department concerned a written report, signed by each member of the board, containing a list of the names of the officers it recommends for promotion and certifying (1) that the board has carefully considered the record of each officer whose name was furnished to it under §615 of this title, and (2) that, in the opinion of a majority of the members of the board, the officers recommended for promotion by the board are best qualified for promotion to meet

> the needs of the armed force concerned among those officers whose names were furnished to the selection board.

10 U.S.C. § 617(a).

As the overseer of the military promotion process, the Secretary of Defense provided additional instructions to the various service secretaries:

> a. Centralized Selection. To ensure fairness in the promotion selection process and a balanced appraisal of the needs of the Military Service concerned, a single selection board shall be convened to consider all eligible officers in the same grade and competitive category for promotion to grades above captain in the Army, Air Force, or Marine Corps; or lieutenant in the Navy....

DoDD 1320.9 (1981), Section D.1.a.

2. The Undisputed Facts

Descriptions of the Air Force promotion board process at issue have been set forth in various judicial decisions, [5] so another detailed exposition will not be provided here. In the briefest of terms, however, each board was broken down into a number of 5-member sub-groups (panels), with each having a minority of the total board membership. The records of the eligible officers were broken down into an equal number of sub-groups and each was distributed to a different panel. Within each panel, each of the 5 members secretly assigned a number score to each record. The records were not passed from panel to panel for scoring by the members of other panels. Instead, the relative ranking of candidates within each panel was developed when the administrative support staff added the 5 scores received by each record and aligned the totals in an Order of Merit [OOM] for each panel. The staff then identified the officers

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[5] 158 F.3d at 578 (A 2-4); 38 Fed. Cl. at 511-13 (A 58-60); 37 Fed. Cl. at 154-55 (A 49-51); 36 Fed. Cl. at 48-49, 51-52 (A 28-30, 35-37).

"recommended" by each panel by ministerially counting down from the top of each panel's OOM until that panel's quota was exhausted. Each member of the board then signed a blank board report, with no list of "recommended" officers attached. After adjournment, the officers "recommended" by "the board" were identified when the staff combined the "recommended" officers from each panel's OOM.

Relevant and undisputed evidence about the process that might **not** be evident from the decisions below includes:

- Each panel member scored records by secretly assigning a number between 6 and 10, in ½ point increments. Each number score had a pre-defined meaning such as "outstanding record" or "strong record" or "average." Air Force Regulation 36-89 (1992), ¶ 14.d. [6] *Joint Appendix* at 26, Neptune v. United States, Fed. Cir. 97-5128 [hereinafter JA _]. [7] A member's score did not indicate whether he or she found an officer to be fully qualified or recommended that officer for promotion.
- Except in unusual cases, there was no discussion and no member knew what score any other member gave to a record. Id. at ¶ 14b(3); JA at 26.
- The cumulative scoring procedure did not ensure majority consensus even within each panel as to who should be recommended because, unknown to the panel, scoring by one or two members could skew a candidate's score up or down. [8]

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[6] AFR 36-89 (1992) was not in effect during the Petitioners' promotion boards. The governing regulation was AFR 36-89 (1981), which provides few details about the process. A 147. Where a specific provision of AFR 36-89 (1992) is cited, it is not cited as authority but rather because the Air Force agrees that it accurately describes the process prior to 1992.

[7] Unless otherwise specified, evidence in the Neptune joint appendix was also in the Small joint appendix.

[8] Assume that a panel has a cutoff score of 44. If Officer Jones gets 4 scores of 9 and one score of 8.5, his total score of 44.5 will be above the cutoff and he will be identified for promotion. If Officer Smith also gets 4 scores of 9 but one score of 7.5, his total score of 43.5 will be below

- the board president was able to direct that records be re-scored by the same or a different panel, and then choose the score that he liked. JA at 338, 1153.
- a computer model, the "Projected Order of Merit" (POM), which the board president used in deciding whether to have records re-scored, was kept secret from the board members as well as from the Secretary of the Air Force. JA 351-42, 1174.
- the POM discriminated on the basis of gender and age. JA 386.
- Panel members did not know which candidates the administrative staff identified for promotion from their panel; board members did not know the select or non-select status of anyone from anyone else's panel. A 135.
- The board members signed a **blank** board report, without being shown a list of the recommended officers, or having any knowledge of either their identities or their qualifications. JA 1203, 1206.
- The Air Force described the members' certification as a "safeguard" of the integrity of the promotion process rather than as the defining element of that process. JA 73.
- the post-board "editing" of the list of officers often resulted in the addition and/or deletion of names -- after the report was signed and the board adjourned. JA 422. [9]
- The Army, Navy and Marine Corps structured their promotion boards so as to allow each member to review each record. A 137-140.

In sum, each member's role during the deliberative phase of the promotion board process was basically limited to secretly scoring the individual records that were distributed to his or her panel. Members made no "findings"

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the cutoff and he will be non-selected. Officer Smith's fate is determined by one panel member, rather than by the majority who deemed him as qualified as Officer Jones.

[9] This piece of information was before the Court of Appeals in Neptune but not Small.

or "recommendations," and played no other part in identifying the "recommended" officers. Instead, those officers were ministerially identified when majority "findings" and "recommendations" were **imputed** to records based upon their total scores' relative placement on each panel's Order of Merit, rather than upon any majority consensus within the panel. At the end, all of the members signed a blank report to "certify" that the officers so identified (whom they did not know) were best qualified "in the opinion of a majority of the members of the board." In the words of a former Assistant Secretary of the Air Force for Reserve and Manpower Affairs, Karen R. Keesling:

> Members do not select or nonselect candidates – they simply score records by secret ballot – selectees are determined by rank order.... In each case the Selection Board members are simply advised that all candidates are eligible for promotion, the actual selectees and nonselectees are not revealed to the members.

A 135.

3. The Contentions

Throughout the proceedings below, Petitioners maintained that the Air Force promotion board process fails to satisfy the plain requirements of the law. The essence of their position was that 10 U.S.C. § 611 was violated because promotion decisions were made by panels, rather than by "selection boards;" that 10 U.S.C. § 616(c) was violated because the members made no majority "findings" or "recommendations," because there was no consensus by "a majority of the members of the board," and because the scoring system did not insure majority consensus even within each 5-member panel; that 10 U.S.C. § 617(a) was violated because the members could not "certify" in-blank a majority consensus that did not exist, a list of officers that they never saw, or the results of a process that they did not fully comprehend; and that DoDD 1320.9 was violated by the de-centralized nature of the autonomous panels.

Petitioners have never complained about the existence of panels, *per se*. Rather, they complain that the unique autonomy of Air Force promotion board panels, in conjunction with their scoring, secrecy, and in-blank procedures, precludes the required majority consensus and unanimous certification.

4. Dispositions Below

The AFBCMR considered the merits of the Neptune, Hoogstra, and Lorenzen applications, but rejected them on timeliness grounds. A 111, 119, 129. The AFBCMR denied the Small application on its merits by summarily adopting the rationale of the Air Force Headquarters Staff. A 83. The essence of that rationale, based largely upon a memorandum from the Office of the Judge Advocate General of the Air Force, was that each member need not review each record because "the specific language of the statute speaks to the corporate board and not to individuals" and that

> "based on their overall participation in the board's deliberations ... the members are in a position to honestly certify that the process in which they participated properly identified, based on the record before them, those officers who were best qualified for promotion.

A 132 [10]

The Court of Federal Claims did not rely upon the "corporate board" theory that had prevailed during the administrative proceedings. Rather, that court granted summary judgment for the Air Force because nothing in the "usual or ordinary" meaning of the word "majority"

> requires an assembled deliberative body or, for that matter, first-hand knowledge on the part of the deliberators of the act of proposition under

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[10] It is noteworthy that this memorandum, on its face, addressed only promotion board reports pursuant to 10 U.S.C. § 617 and not the "findings," "recommendations," and "majority" requirements of 10 U.S.C. § 616(c).

> consideration. To become the act or choice of the body, all that is required is a numerical showing that more than half of the members entitled to act on a matter have each registered their approval (or disapproval) of the proposition in question. There is therefore no reason why the business of coming to a "majority" consensus cannot be accomplished through collective approval of the findings and recommendations of a sub-group – *i.e.*, a selection panel.

Small v. United States, 37 Fed. Cl. at 156 (A 53-54); Neptune et al. v. United States, 38 Fed. Cl. at 515 (A 65), citing, Small v. United States, supra. [11] But see Roane v.

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[11] Judge Wiese, who presided in Small, had previously stated:

> The court is of the view that [10 U.S.C. § 617's] mandate - promotion only of the best qualified - cannot be achieved when the selection process is carried out, as it was here, by dividing the class of promotion-eligible officers into a number of separate sub-groups with each sub-group to be evaluated by a separate panel of selection board members.
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> * * *
>
> [A]bsent additional corrective steps, the sub-grouping of promotion candidates holds out the distinct possibility that some individuals who fail to win promotion would, in fact, be promoted were their records evaluated within the context of the entire promotion group while other individuals, who are recommended for promotion, would not receive that recommendation were their records scored against the entire promotion group.

A 18-19. In its July 8, 1996, decision, the Court of Federal Claims accepted the Air Force's representations that quality review safeguards were in place and "assured an equal distribution in quality of records among the promotion panels." 36 Fed. Cl. at 52 (A 37). Major Small moved for reconsideration on the grounds that the "equal distribution" issue was not ripe for disposition by summary judgment because he had been denied a fair opportunity to respond to the government's affidavits. After limited discovery had been afforded, Major Small demonstrated several problems with the government's affidavit evidence. These included Air Force statistics that undermined its conclusory representations that "equality" was achieved. The court vacated the

United States, 36 Fed. Cl. 168, 170 (1996) (members may not "rely on the judgments of their colleagues in certifying that a candidate is 'best qualified.' The panels cannot act as rubber stamps for decisions made by others.").

In both Small and Neptune, the court also derived support from the fact that the Air Force's panel system "garnered no note of disapproval" in S. Rep. No. 102-482, *Report on the Conduct of Proceedings for the Selection of Officers for Promotion in the U.S. Air Force*, 102nd Cong., 2nd Sess. (1992). 37 Fed. Cl. at 156 (A 54); 38 Fed. Cl. at 515-16. (A 65-66). On this subject, Petitioners demonstrated, *inter alia*, that the Department of Defense Report underlying S. Rep. No. 102-482 was based on an inaccurate description of the promotion board process. The Department of Defense understood, for example, that the board took "a final vote to confirm the list" which was translated "into a formal board report, under 10 U.S.C. 617, [and] **then** signed by every board member and board recorder." *Plaintiff's Second Motion for Reconsideration* at 5-7, Small v. United States, Fed. Cl. No. 94-618C (Jan. 29, 1997). Petitioners also emphasized that S. Rep. No 102-482 stated on its face (p. 17) that the DoD Report "did not serve as a comprehensive review of selection boards" and that that Report was silent about many aspects of the Air Force promotion board process, including board presidents' secret use of the POM and their discretion to have records re-scored.

Petitioners' efforts were unavailing: Major Small's *Second Request for Reconsideration* was denied on February 3, 1997, and Neptune was issued on July 22, 1997. [12]

In the Court of Appeals, Major Small appealed the lower court's construction of the statutes. The Neptune

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"equal distribution" part of its initial decision, and changed the rationale for the rest of that decision, by issuing an *Opinion on Reconsideration* on January 15, 1997. Small, 37 Fed. Cl. 149 (A 40).

[12] In Neptune, the court took a different approach to the plaintiffs' evidence of inequitable record distribution by holding that the issue was non-justiciable. 38 Fed. Cl. at 516 (A 66-68).

appellants raised those same statutory issues as well as the lower court's unprecedented use of the non-justiciability doctrine to exclude their evidence. The Court ordered that the cases be assigned to the same merits panel and heard consecutively by that panel. *Order*, Fed. Cir. Nos. 97-5074 and 97-5128 (Sept. 30, 1997).

The Court of Appeals chose Small as its vehicle for decision. Opining that "Congress has not spoken to the issue of whether the selection board must conduct its itself as a collective body" and that "[n]othing in the plain language of the statute requires first-hand knowledge on the part of the deliberators of an officer's record," the Court of Appeals proceeded to assess the permissibility of "the Air Force's interpretation of the statute" under Chevron:

> The Air Force, like the other branches of the military, is confronted with establishing a selection process pursuant to statute that is fair in view of the extensive number of individual officers who may be eligible for consideration. A review of a selected number of individuals by sub-panels who use common and identifiable criteria is an efficacious and equitable means to establish the final rankings that are in fact approved by a majority of the members of the board. ... In sum, we agree with the trial court that "[t]here is . . . no reason why the business of coming to a 'majority' consensus cannot be accomplished through collective approval of the findings and recommendations of a sub-group – i.e., a selection panel." *Small*, 37 Fed. Cl. at 156. In addition, using the signing of the Board Report as a means for the members to both express their approval of the recommended candidates and make the required certification is permissible under the statutory scheme as well.

158 F.3d at 581 (A 9-10). In addition, the Court of Appeals found "unpersuasive" Petitioners' arguments about the

"policy of centralized review in the promotion process" that is set forth in DoDD 1320.9. Id.

Reasons for Granting This Writ

Under the "Rule of Four," a Petition for Writ of Certiorari is granted upon the concurrence of four Justices. Rice v. Sioux City Memorial Park Cemetery, Inc., 349 U.S. 70 (1955). Assume, given this Court's large caseload, that an aspiring administrator comes up with a plan to streamline the process. Under this plan, the Court is split into three groups of three Justices each. The Petitions received during each term are randomly divided into three piles, and each pile is sent to a different group of three Justices. The Justices are precluded from discussing the petitions with either of the other two Justices. Instead, each of the three Justice assigns a number score to each petition, which reflects his or her conviction about the merit of that case. A "1," for example, means that the petition was an unmitigated waste of paper while a "10" means that *certiorari* must be granted if the republic is to survive. Within each group, the Clerk of Court then adds the three individual Justices' scores for each petition and ranks each petition, from highest to lowest. Each panel has its own list. No Justice knows, however, what score any other Justice gave to any of the petitions; nor does any Justice know the results of the Clerk's addition and ranking exercise.

No petition is ever actually voted on by the four Justices contemplated by the "Rule of Four." Instead, all of the Justices congregate in a room and sign a blank piece of paper certifying that they have identified the cases most worthy of *certiorari* review. Orders granting and denying *certiorari* are publicly announced when the Clerk works his way down from the top of each three-Justice group's list (alternating so that each group selects an equal number of cases for review) until the quota of cases that can be prudently accepted for full review is filled.

According to the Court of Appeals decision in this matter, this plan would satisfy the "Rule of Four" because

that rule contains no express requirement that the Justices have "first-hand" knowledge of any of the petitions and because the plan is expedient. In addition, because all of the Justices are guided by the uniform standards set forth in Rule 10, the new system would be upheld as "equitable."

This hypothetical plan would do as much violence to this Court's "Rule of Four" as the Air Force promotion board process does to 10 U.S.C. §§ 611, 616, and 617. As the following will show, the Court of Appeals reached its conclusion by closing its eyes to the plain meaning of the statutes, ignoring a wealth of other evidence of legislative intent, disregarding a controlling DoD Directive, and misusing Chevron USA, Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984). Its deference was so excessive that one of the linchpins of our entire democracy – majority consensus – no longer means in the Federal Circuit what we as American have come to understand and expect. *Certiorari* should be granted to correct the Court of Appeals' errors and to give important legal guidance to the military departments regarding their promotion boards.

I. The Proceedings Below Violated Petitioners' Rights to an Appeal and to Due Process of Law.

As an initial matter, the Petitioners raise the issue whether the Court of Appeals denied Petitioners their rights to an appeal under 28 U.S.C. § 1295 and to due process of law under the Fifth Amendment.[13]

Read at face value, the facts and issues articulated by the Court of Appeals bear little relation either to the undisputed facts in the Small and Neptune cases or to the issues raised

[13] By analogy to 28 U.S.C. § 1291, appeals from the Court of Federal Claims to the Court of Appeals for the Federal Circuit under Section 1295 are afforded as a matter of right. See Heckler v. Edwards, 465 U.S. 870, 876 (1983) (28 U.S.C. § 1291 affords an appeal as a matter of right). Where there is an appeal of right, rights of due process are triggered. See Evitts v. Lucey, 469 U.S. 387, 400-402 (1985).

by Petitioners in their appellate briefs.[14] The Petitioners' appeals challenged the legality of a promotion system in which it is undisputed that the majority signs a board report **in blank** with no list of candidates attached and with no knowledge of the content of the majority's "recommendations" and "findings." Rather than address the Air Force's actual promotion process, the Court of Appeals introduced wholly new and unsupported "facts" into the case. The resulting decision appears on its face to uphold a system never employed by the Air Force in which the majority "in fact" "approves" and "adopts" a "slate of candidates." 158 F.3d at 578, 581 (A 4, 9-10).

Only by expanding the words "approve" and "adopt" to mean unknowing signatures in blank and imagining the words "slate of candidates" to mean a list that does not exist until after the board adjourns, is it possible to read Small as responsive to the statutory interpretation issues raised by Petitioners. Nevertheless, the Air Force has argued, and the Court of Federal Claims has ruled, that Small does, in fact, extend to the Air Force's *actual* promotion process -- that is, it upholds an in-blank promotion process in which the majority has no knowledge of its "recommendations" and "findings" and in which no list or slate of candidates exists or is presented in any form to the members for their approval.[15] The analysis that follows assumes that the Air

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[14] The only appellate issue that the Court of Appeals explicitly addressed is whether Sections 616(c) and 617(a) may be collapsed so that the majority "recommendation" and "finding" requirements of Section 616 may be satisfied by the unanimous certification requirements of Section 617. 158 F.3d at 581. Its holding in this regard is erroneous for the reasons stated in Sections III.A, B, and E, infra.

[15] In the pending case of DiStefano v. U. S., Fed. Cir. No. 99-5046, the government argues that Small compelled the summary dismissal of a complaint expressly alleging in-blank, certifications, recommendations, and findings; the absence of majority consensus; and the fraudulent, secret alteration of the promotion list. The government argues similarly in Fluellen v. U.S., Fed. Cl. No. 94-537C, which is still pending before the Court of Federal Claims.

Force will take the same position here and that Small does, in fact, address the *actual* in-blank Air Force promotion process that was undisputed below.

II. The Chevron Test

In Chevron, this Court held that courts must accord deference to the statutory constructions of administrative agencies when two conditions are met. First, there must be an ambiguity or a gap in the statute that requires elucidation by the agency. Chevron, 467 U.S. at 842-43. "If by employing traditional statutory construction tools, the Court determines that Congress' intent is clear, that ends the matter." Regions Hospital v. Shalala, 522 U.S. 448, 451 (1998) (citations omitted). Second, if there is such an ambiguity or gap, "the question for the court is whether the agency's answer is based on a permissible construction of the statute." Ibid. at 843. "If the agency's reading fills a gap or defines a term in a reasonable way in light of the legislature's design, [courts] give that reading controlling weight, even if it is not the answer the court would have reached...." Ibid. at 457 (citations omitted).

As the following will show, Chevron deference was inappropriate in this case because, using traditional tools of statutory construction, the legislative intent is clear.

III. Chevron's First Requirement is not Satisfied because, using Traditional Tools of Statutory Construction, Congress' Intent in Sections 616(c) and 617(a) is Clear and Unambiguous.

Purporting to apply Chevron's first requirement, the Court of Appeals concluded that "Congress has not spoken to the issue of whether the selection board must conduct itself as a collective body." 158 F.3d at 581 (A 9). It also concluded that "[t]he statute does not require that a majority determination be based on a knowing review and conscientious consideration of each officer's record. Nothing in the plain language of the statute requires first-hand

knowledge on the part of the deliberators of an officer's record." Id. Contrary to Chevron, however, the Court made no attempt to ascertain Congress' intent with regard to the other statutory provisions and issues in this case. For example, the Court concluded that it was permisible for board members to "express their approval of the recommended candidate and make the required certification" by the single act of signing a blank board report without any analysis of the language and structure of Sections 616 and 617 to determine whether Congress intended a different result. In addition, the Court made no analysis of the larger statutory scheme to determine whether centralized review was contemplated.

The following will show that the Court of Appeals did not apply well-established cannons of statutory construction in interpreting any aspect of the statutes at issue. Those statutes speak very clearly to the requirements of knowledge, a two-step recommendation and certification process, and centralized review.

A. The Plain Meaning of the Statutes Requires Actual Majority "Recommendations" and "Findings" and a Separate "Certification" by Members who are Cognizant of their Actions

A court's "first step in interpreting a statute is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case." Robinson v. Shell Oil Co., 519 U.S. 337, 340 (1997). In so doing, the language of a statute should be interpreted according to its "ordinary understanding." Babbitt v. Sweet Home Chapter of Communities for a Greater Oregon, 515 U.S. 687, 697 (1995).

10 U.S.C. § 616(c) states that the board "may not recommend a candidate for selection unless - (1) the officer receives the recommendation of a majority of the members of the board; and (2) a majority of the members of the board

finds that the officer is fully qualified for promotion." (emphasis added). 10 U.S.C. § 617(a) then requires a report signed by each member "containing a list of the names of the officers whom [the board] recommends for promotion" to "certify" that "in the opinion of the majority of the members of the board, the officers recommended for promotion are best qualified for promotion." (emphasis added)

The very nature of these words and the nature of the majority-building process demand that the participants have *some* knowledge of what they are doing and that there be *some* knowing, centralized action. Inherent in the words "find," "recommend," and "opinion" is the idea that the actor knows the views that he holds. Inherent in a "certification" of the "opinion of the majority" is the requirement that each member know something about the majority opinion that he is purporting to "certify." Also, it is clear that a "finding" and a "recommendation" are something more than a mere signature. This is obvious from the fact that Congress legislated a two-step process: "findings" and "recommendations" by "a majority of the members of the board," and **then** a unanimous certification of that majority consensus. The statutory requirement of a "list" precludes any conclusion that an ignorant signature of a blank board report fulfills the statutory requirements.

Nor is there any common law tradition that permits decision-making in blank. To the contrary, persons charged with making decisions are required to act on the basis of some knowledge. See Morgan v. United States, 298 U.S. 468, 481 (1936) ("the one who decides must hear"); Accardi v. Shaughnessy, 347 U.S. 260, 266 (1954) (where official is given statutory grant of authority to exercise discretion, "recipient must exercise his authority according to his own understanding and conscience."). See also United States v. Beebe, 180 U.S. 343, 354 (1901) ("Knowledge of the facts is an essential element of ratification."); Western National Bank v. Armstrong, 152 U.S. 346, 352 (1893) ("It is scarcely

necessary to say that a ratification, to be efficacious, must be made by a party ... with knowledge of the material facts.").[16]

The Court of Appeals did not have to look any farther than the terms of Sections 616(c) and 617(a) to conclude that there were no "findings" or "recommendations" by "a majority of the members of the board" for the members to "certify," and that they could not "certify" something they did not know.

B. A Well-Established Principal of Statutory Construction Requires that Effect be Given to Every Statutory Provision.

A "cardinal principle of statutory construction is to ... give effect, if possible, to every clause and word of a statute, rather than to emasculate an entire section as the Government's interpretation requires." United States v. Menasche, 348 U.S. 528, 538-39 (1955). The Court of Appeals violated this principle when it collapsed the statutes' two-step process into a one-step signature in blank.

Section 616(c) describes the process by which officers are to be identified as the "best qualified," and thereby recommended for promotion. Indeed, Section 616(c) contains the substantive "meat" of the entire promotion board process. By its terms, a board has no authority to recommend any officer for promotion "unless" there are prescribed "findings" and "recommendations" about that officer by "a majority of the members of the board." Section 617(a) is merely a safeguard to certify a pre-existing

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[16] This does not mean that the decision-maker cannot rely on summaries or briefings prepared by others. In the Navy and Marine Corps, members "vote" on each candidate on the basis of briefings from other members. A 139, 140. See also Morgan, supra, 298 U.S. at 481 (evidence may be "taken, sifted and analyzed" by others); Senate Rule IX (in impeachment hearings, entire Senate briefed on testimony given in committees before a vote of the entire body).

majority consensus, rather than the means to reach that consensus in the first (and only) instance.[17] The single ignorant act of certifying the board report pursuant to Section 617(a) cannot substitute for the majority "findings" and "recommendations" required by Section 616(c), because this substitution would eviscerate Section 616(c). Such an interpretation would mean that Congress "wrote a meaningless provision into the law" because Section 616(c)'s provisions would be rendered "useless, inexplicable, inoperative, void, insignificant, meaningless, and superfluous." Kelly v. United States, 826 F.2d 1049, 1052-53 (Fed. Cir. 1987).

C. Centralized, Knowledgeable Review is Implict in the Larger Statutory Scheme

Another valuable tool of statutory construction is reference to "the language and import of other provisions of the Act." Dole v. United Steelworkers of America, 494 U.S. 26, 38 (1990). In this case, other provisions of the statutory promotion scheme leave no doubt that Congress intended the knowing and centralized review of promotion candidates.

In 10 U.S.C. §§ 266 and 612(a)(3), Congress mandated that a board considering Reserve officers include at least one Reserve officer among its membership. It did so in order to insure Reserve participation in the promotion process and thereby protect Reserve officers from bias and prejudice on the part of Regular members of a board.[18] Centralized and knowing review is implicit in these statutory provisions because the Reserve member cannot perform his statutory function unless he is personally involved in the consideration of each eligible Reserve officer. That intent is frustrated

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[17] See JA 73 (Air Force describes certifying signature as a "safeguard" of the integrity of the promotion process).

[18] Dilley v. Alexander, 603 F.2d 914, 923 (D.C. Cir. 1979); Doyle v. United States, 599 F.2d 984, 994 (Ct. Cl. 1979).

when the Reserve member serves on only one autonomous panel and plays no role in the consideration of Reserve eligibles whose records are randomly distributed to the other panels, as the Court of Appeals' interpretation allows.

Congress also permits service Secretaries to provide selection boards with "information relating to the needs of the armed force concerned for officers having particular skills." 10 U.S.C. § 615(4) (1980). That is because the statutory scheme contemplates a balancing of the skills needed within the organization.[19] This is clear evidence of intent that review be centralized and knowing because a board cannot perform this balancing function if promotion "decisions" are made piecemeal and blindly at the panel level. It can only be performed if the board considers the complete list of candidates and the full range of their skills.

D. The Legislative History Reflects Congress' Intent that the Promotion Board Process be Knowledgeable and Centralized.

"[A]ppeals to statutory history are well taken only to resolve 'statutory ambiguity.'" Barnhill v. Johnson, 503 U.S. 393, 401 (1992). Petitioners maintain that there is no ambiguity here. Nonetheless, it is worth noting that the Senate Armed Services Committee wrote at length about centralization in 1992. According to the Committee, the "statutory **centralized** selection process" contemplates that officers "compete against their peers throughout the Air Force." S. Rep. No. 102-482, supra at 9 (emphasis aded). At the same time, it resoundingly condemned a de-centralized

[19] See 10 U.S.C. § 613 (members take oath to consider "both the special fitness of the officers and the efficiency of his armed service."); 10 U.S.C. § 616(a) ("A selection board convened under section 611(a) of this title shall recommend [officers], giving due consideration to the needs of the armed force concerned for officers with particular skills"); 10 U.S.C. § 617 (certification that officers are deemed best qualified "to meet the needs of the armed forces concerned").

selection board process that "precluded officers from competing against their counterparts on a Service-wide basis." Id. at 8-11, 21. This is an unmistakable manifestation of legislative intent that promotion consideration be centralized. The service-wide competition Congress intended is impossible if the only "decisions" being made are at the panel level in competition among only the small fraction of the "peers" whose records are distributed to the same panel.

E. The Court of Appeals' Interpretation is Unworkable.

Finally, as this Court has aptly observed, "We need not leave our common sense at the doorstep when we interpret a statute." Price Waterhouse v. Hopkins, 490 U.S. 228, 241 (1989). Similarly, "[i]t is worth contemplating what the result would be if [a court's] interpretation were to prevail." Greenwood v. Peacock, 384 U.S. 808, 832 (1966). The Court of Appeals holding, 158 F.3d at 581 (A 10), that board members may both "express their approval of the recommended candidate and make the required certification" by the single act of signing a blank board report yields absurd results.

If there is no knowledge requirement and the signature requirement of Section 617(a) is the sole operative element of the statutory scheme, it would be possible for a computer to identify the "best qualified" officers and then have members (who know nothing about the computer program or who the computer identified) sign a blank report to certify their faith that the "best qualified" candidates had in fact been recommended. It would even be possible for the Secretary to make all the recommendations and require in-blank approval.

Furthermore, board members' certifications cannot operate to "express their approval of the recommended candidate" for four reasons. First, there is no list of recommended officers when the members sign the report. Thus, a member's signature cannot express any "approval"

of any "recommended" candidate. See Villanueva v. Brown, 103 F.3d 1128, 1139 (3rd Cir. 1997) (one may "not ratify an event which has not yet occurred").

Second, Section 617 requires certification of a majority opinion regarding the recommended candidates, not of the signatory's individual opinion. In other words, a board member could disagree with the board's recommendations (provided he knew them) and still properly sign and certify the report. The Court of Appeals' interpretation (counting each certifying signature as an individual approval) is not feasible because it is not possible to divine a member's individual approval from a signature that the law requires of "each member," concurring and dissenting [20] alike.

Conversely, the Court's interpretation leaves the members with no way to express their disapproval of any recommended officers. Section 617 mandates a report signed by "each member" of the board. Once again, it is not possible to divine a member's approval or disapproval from a signature that the law requires. [21]

A final reason why the Court of Appeal' interpretation is unworkable is that it destroys the confidentiality guaranteed by 10 U.S.C. § 618(f), which protects all board members' deliberations from disclosure to anyone who is not a board member. Because the board report is made available to the public, [22] it is imperative that it not reflect any individual board member's personal views. Section 617's express

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[20] Of course, there is nothing to dissent from because no "recommended" officers are ever put before the board members for their consideration.

[21] As originally proposed by the Department of Defense, Section 617 would have required a report "signed by a majority of the members" to certify that the recommended officers were best qualified. H. R. Rep. No. 96-1462, supra at 68. Under such a provision, any member approving the "recommended" officers could sign the report and any member disapproving the "recommended" officers could decline to sign. Section 617 was not enacted as DoD proposed it.

[22] The reports from the Petitioners' promotion boards were acquired under the Freedom of Information Act.

requirement of a unanimous certification of an antecedent majority opinion dovetails with the confidentiality provisions of Section 618 by making it impossible for anyone to discern any board member's "vote" from the board report.

Congress' clear intent in fashioning both Sections 617 and 618 was to accord board members the freedom to make conscientious decisions free from outside pressure and duress. [23] The Court of Appeals' decision, upholding the *discretion* of the Air Force to require board members to assert their individual views in the certification not only results in disclosure of board members' deliberations in violation of Section 618(f), it also makes individual dissent all but impossible.

Without the unanimous certification required by Section 617(a), there is no valid board report for processing pursuant to Section 618 and there can be no promotions. Under the Court of Appeals' interpretation, the dissent of a single member would require the reconvening of a new board, result in a waste of thousands of vital man-hours, and unduly delay needed promotions. [24] Dissents on a succession of boards could postpone promotions for *years*. In short, the Court of Appeals places an onerous burden on the conscience of the individual board member, requiring him to either express concurrence with a proposed list of candidates (or, in the Air Force, a blank board report) or risk compromising his own career and the strength and readiness of his service. This is an appalling result that is completely contrary to Congress' intent.

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[23] See S. Rep. No. 102-482, supra at 2 (proceedings privileged "[t]o encourage candid discussions free from outside interference").

[24] Selection boards are convened when the Secretary determines that "the needs of the service require." 10 U.S.C. § 611(a).

IV. Chevron Deference, if any, should have been Accorded to DoD, the Agency with Primary Responsibility to Implement the Promotion Board Statutes at Issue.

In contrast to the unofficial and litigation-oriented statements by the Air Force, the Department of Defense had an officially-promulgated position. DoD Directive (DoDD) 1320.9, ¶ D(1)(a), states the DoD's policy that the promotion process must be "centralized" so that a single board can "ensure fairness in the promotion selection process and a balanced appraisal of the needs of the Military service concerned." A 144. The Court of Appeals' response to Petitioners' argument was that it was "unpersuaded" by "the policy of centralized review in the promotion process." 158 F. 3d at 158 (A 10).

This disregard for DoD's policy statement was erroneous for several reasons. First, the Court misunderstands the nature of DoD "policy" in a DoD Directive. As stated in DoDD 5025.1, ¶ D.2 (June 24, 1994):

> 1.a. DoD Directives provide policy required or authorized by legislation . . . to initiate, govern, or regulate actions or conduct by the DoD Components....
>
> * * *
>
> 3. DoD Directives shall be written in such a way to preclude requirements for the publication of implementing documents by the DoD Compenents whenever possible. ... When implementing documents are not required, or when the deadline for issuing implementing documents has not been met, the DoD Directive ... shall be directly applicable to all elements within the DoD Component, and the Head of the DoD Component shall be responsible for carrying out the DoD guidance.

In short, DoD "policy" articulated in a DoD Directive is not optional. It is binding on subordinate DoD components such as the Air Force.

The second problem with the Court of Appeals' failure to defer to DoD policy is that Chevron contemplates deference to administrative interpretations precisely because they are policy determinations upon which the judiciary should not intrude. 467 U.S. at 843-44. For a court to disregard DoDD 1320.9 as mere policy turns Chevron on its head.

Third, Chevron deference is afforded to the agency that "administers" a statute. 467 U.S. at 842. The agency responsible for administering the statutory selection process is the Department of Defense. 10 U.S.C. § 611(a) (selection boards convened "[u]nder regulations prescribed by the Secretary of Defense"). Pursuant to that statutory authority, the Secretary of Defense issued DoDD 1320.9, Section D(1)(a), mandating "centralized selection" by "a single board."

One advantage of Chevron has proven to be consistency in the application of national statutes. 1 Davis and Pierce, *Administrative Law Treatise* § 3.4 (1994). Such consistency is of paramount importance here because DOPMA was enacted for the very purpose of establishing "uniform laws for promotion procedures in the separate services." H.R. Rep. No. 96-1462, supra at 3. To ensure that DOPMA achieved the uniformity desired by Congress, DoD was given primary responsibility under the statutory scheme. Consistent with the mandate of DoDD 1320.9, the Army, Navy, and Marine Corps have all the members of their promotion boards collectively consider all the candidates. A 138-40. Only the Air Force interprets the statutes as permitting piecemeal consideration of the candidates (and their skills) within panels, where they compete only against other candidates whose records happened to go to the same panel. Consistency in the administration of statutes that apply to all the military services demands that deference be

afforded the interpretation of the agency that oversees those military services – the Department of Defense.[25]

In sum, DoDD 1320.9 was not merely a gratuitous act by the Secretary of Defense. It was a statement of official policy and an authoritative construction of the statutory scheme by the agency that is responsible for its administration. Section D(1)(a) represents the Secretary of Defense's determination that "fairness in the promotion selection process" can best be achieved by insuring that candidates compete against their peers Air Force-wide through "centralized selection" by "a single board." It also represents the Secretary of Defense's determination that "a balanced appraisal of the needs of the Military service concerned" can best be achieved by considering the full range of skills offered by all the eligible officers through "centralized selection" by "a single board." The provisions of DoDD 1320.9, Section D(1)(a), rather than any non-conforming, unpublished interpretation advanced by the Air Force, were entitled to deference in any Chevron analysis.

V. The Air Force's Statutory Construction is both Irrelevant and Impermissible.

There was no need for the Court of Appeals to decide whether the Air Force's construction of Sections 616 and 617 was "permissible" because the Air Force's promotion process clearly violates federal statutes and DoD Directive and these authorities put "an end to the matter." Petitioners nonetheless wish to offer a few observations about the Court of Appeals' "permissibility" analysis.

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[25] Rapaport v. Treasury, 59 F.3d 212, 216 (D.C. Cir. 1995) (Deference to an agency with shared administrative responsibilities "would lay the groundwork for a regulatory regime in which either the same statute is interpreted differently by the several agencies or the one agency that happens to reach the courthouse first is allowed to fix the meaning of the text for all.").

The Court of Appeals' conclusions regarding permissibility are based on two considerations: expedience and equity. With respect to the first of these, it goes without saying that burdens imposed on a party do not excuse deviation from a statutory scheme. King v. St. Vincent's Hospital, 502 U.S. 215, 220 (1991) ("[I]f we were free to tinker with the statutory scheme we could reasonably accord some significance to the burdens imposed on" the parties.). Furthermore, the Army, Navy, and Marine Corps have demonstrated that knowing and "centralized" review is entirely possible under the existing statutory scheme.

With respect to the Court of Appeals' equity argument, Petitioners note that the undisputed evidence showed that the Air Force promotion system is anything but equitable. For example, the government's own witness admitted that the board president may shuffle records from panel to panel until he obtains a score that he "likes." JA 1153. There is nothing equitable about a system in which a senior officer manipulates the process behind the scenes to effect a desired outcome. In addition, undisputed testimony established that the board president and board staff relied on a computer model called the POM that was kept secret from both the board members and the Secretary of the Air Force. JA 351-42, 1174. The undisputed testimony also established that this computer model discriminated on the basis of gender and age. JA 386. This cannot be considered equitable by anyone's yardstick.

In addition, statistical evidence showed that there were significant deviations in scoring and/or quality of distribution that resulted in disparate promotion opportunities depending solely on the panel to which an officer's record was assigned. JA 371-83. This is certainly not an equitable substitute for the centralized, service-wide process mandated by statute. Lastly, the evidence in Neptune is that the Air Force secretly changed the select and non-select status of the candidates before issuing the final selection list and destroyed the panel members' scores. JA 422. The in-blank process, upheld by

the Court as "equitable," guarantees that names may be secretly and illegally substituted by Air Force officials with complete impunity.

In short, the Air Force promotion system violates express federal statute and DoD Directive; it is certainly not sustainable on the ground that it is "equitable."

Conclusion

Federal promotion board statutes clearly contemplate that each and every officer will be accorded the *process* of having his record compared with that of every other candidate on an informed and equal basis. It further contemplates that selection and non-selection decisions will be made -- not by a single supporter or detractor on the board -- not by a select minority of the board -- not by a computer -- and not by a behind-the-scenes administrator -- but by a *majority* of the voting members of the board. Lastly, it contemplates that every officer will have the peace of mind that comes with unimpeachable selection board results -- results that are agreed to by the *majority* and are *certified* by each of its members. [26] No officer should have his career terminated by a process that is less dignified than that expressly mandated by Congress, and for any court to hold otherwise is to ignore not only Congress' authority but also society's moral obligation to its men and women in uniform. Veterans are entitled to no less justice in back pay cases than are civilian. The Court of Appeals decision, which eviscerates the procedural protections implemented by Congress and substitutes an in-blank process does not do justice to Air Force officers. For this reason (as well as for

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[26] See S. Rep. No. 102-482, supra at 1 ("Adherence to established laws and regulations is necessary to ensure that the best qualified officers are selected for promotion, and that the officer corps has confidence in the integrity of the selection process.") and 20 ("The Committee [on Armed Services] has acted through legislation, review of nominations, and oversight to ensure that the procedures used for selection boards are fair to the officer corps and are designed and conducted to select the best qualified officers for promotion.").

the legal reasons stated herein) this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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June 10, 1999

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UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

No. 97-5074

WALTER D. SMALL,
Plaintiff-Appellant,

v.

UNITED STATES,
Defendant-Appellee.

DECIDED: October 14, 1998

Guy J. Ferrante, King & Everhard, of Falls Church, Virginia, argued for plaintiff-appellant. Of counsel on the brief was Kathleen St. John, of Marietta, Georgia. Of counsel was Kane St. John, of Marietta, Georgia.

Armando O. Bonilla, Attorney, Commercial Litigation Branch, Civil Division, Department of Justice, of Washington, DC, argued for defendant-appellee. With him on the brief were Frank W. Hunger, Assistant Attorney General, David M. Cohen, Director, and Joseph A. Kijewski, Assistant Director. Of counsel on the brief was Lt. Col. Steven J. Pecinovsky, Attorney, General Litigation Division, U.S. Air Force, of Arlington, Virginia.

Before PLAGER, CLEVENGER, and GAJARSA, Circuit Judges.

DECISION

GAJARSA, Circuit Judge.

Walter D. Small appeals from the decision of the United States Court of Federal Claims, *Small v. United States*, 37 Fed. Cl. 149 (1997), holding that the use of a panel evaluation system in the officer promotion process did not contravene relevant statutory requirements (the "promotion board issue") and that the use of a prior pass-over as part of the information relied upon to determine the level of indorsement of an officer evaluation report (OER) presented a nonjusticiable issue (the "officer evaluation issue"). We hold that the panel evaluation system does not violate the relevant statutory requirements and therefore affirm the decision of the trial court with respect to the promotion board issue. We also affirm the trial court's holding with respect to the officer evaluation issue.

BACKGROUND

1. The Promotion Board Issue

Mr. Small is a former major in the United States Air Force ("Air Force") who was twice passed over for promotion to the rank of lieutenant colonel and thereafter was involuntarily separated from the military upon completion of the twenty-year service period required for retirement pay eligibility. This is the so called "up or out" policy of the Air Force. Mr. Small argues that the 1986 and 1987 selection boards that considered his record for promotion were in violation of 10 U.S.C. §§ 616 & 617 because, among other things, these boards conducted their business in panels acting essentially independently, rather than in concert as a single deliberative entity.

Officers who are designated to serve on a selection board are divided into subordinate panels for their independent scoring of records and their recommendation of officers for promotion. Prior to actual scoring of records, board members are formally briefed as to the scoring procedures and then participate in a practice scoring exercise. The purpose of such exercise is to establish a

uniform board standard of scoring. Following this training, the Air Force uses a reverse social security number method to distribute the records of the candidates to the various panels. Twenty individual records of the eligible candidates for promotion are sequentially assigned to each of the panels until all the records are distributed.

Individual panel members score each candidate's records separately. As soon as a panel has reviewed and scored a block of twenty candidates' records, the scores given to each candidate by the individual panel members are summed and the total score given to each candidate is then prioritized in its relative order of merit among all the candidates' scores by that panel. Each panel is assigned a proportionate share of the entire board's promotion quota. After a panel has completed scoring all of its candidates and has sequenced the records according to their relative order of merit, the panel's proportionate share of the promotion quota is then applied to the scored candidates, beginning with the highest merit score and moving down through the numerical rankings until the promotion quota is exhausted.

When a panel's proportionate quota is applied to that panel's relative order of merit and the numerical scoring level at which the promotion cut-off point occurs contains more candidates than can be accommodated within the panel's promotion quota, the candidates with the same scores are referred to as candidates in the "gray" zone. When gray zone candidates appear, the panel is required to rescore these records in order to eliminate the duplicative scores. For example, if a panel's promotion quota is 50 candidates and 45 candidates fall into score categories above the gray zone and ten candidates are in the panel's gray zone, the panel must rescore the ten gray zone candidates in order to determine the five best among the ten.

Prior to the convening of each promotion board, the eligibility criteria, method of selection, promotion quota, and statistical data are submitted to and approved by either the Secretary of the Air Force or the Assistant Secretary of the

Air Force for Manpower and Reserve Affairs. At the conclusion of each promotion board, the board formally submits a written report, pursuant to 10 U.S.C. § 617, to the Secretary of the Air Force apprising him or her of the results of the promotion board's session (the "Board Report"). Prior to signing the Board Report, each panel member must decide whether to indorse the slate of candidates selected by the individual panels. Each member must certify that the board has (1) carefully considered the record of each promotion candidate and (2) recommended for promotion only those candidates found to be the "best qualified" for promotion among the candidates considered. If a majority of the board members adopts and certifies to the foregoing, then the Board Report is finalized and presented to the Secretary of the Air Force.

Mr. Small argued below that the use of panels to make decisions for the entire selection board violated the relevant statutory provisions, which require that (1) the board make findings and recommendations regarding the candidates for promotion and (2) each member of the board certify that the officers recommended for promotion are the best qualified in the opinion of a majority of the board members. *See* 10 U.S.C. §§ 616 & 617. The Court of Federal Claims held that, because nothing in the statute required personal knowledge for a majority determination by the board, the panel system complied with the statutory requirements.

2. The Officer Evaluation Issue

Air Force Regulation 36-10 (Nov. 1982) ("AFR 36-10") is the administrative guideline that sets out the requirements governing the preparation and processing of OERs. This regulation contemplates an officer evaluation system keyed to the chain of command. Each officer's performance is evaluated by a "rater" (the officer's immediate supervisor), by an additional rater (the rater's rater) and by an indorser (the additional rater's rater). Commanders are given some latitude in structuring the reporting chains for their respective commands. Although

raters must be identified and assigned before the closeout date of a ratee's report, this requirement of pre-identification need not be applied to the additional rater or the indorser. The regulation vests commanders with discretion in determining the level of indorsement to be applied to a given OER, which in turn provides "a further opportunity to achieve differentiation [among ratees] and recognizes that both level of indorsement and indorser grade have an impact on those who use the OER." AFR 36-10, para. 2-23(b).

Mr. Small contests the procedure used by the Space Division of Air Force Systems Command in order to identify those OERs that merited a higher level of indorsement. As demonstrated in the record before us, that procedure involved the rater's preparation of a separate form, an OER Indorsement Request Form, that accompanied the OER and that presented a brief summary of an officer's military record including prior pass-overs. On the reverse side of this same form, the rater was required to indicate a suggested level of indorsement and to provide a justification supporting the suggested indorsement and text. Upon completion, this form, together with its related OER, was then forwarded to the base personnel office for review to assure compliance with prescribed format and completeness of data entries.

In this case, Mr. Small's rater prepared an OER and gave the Appellant the highest possible score in each of the listed performance factors. On the accompanying OER Indorsement Request Form, the rater suggested that the chief commander of the Space Division, who was a three star general, indorse the OER. The OER and the indorsement form were then forwarded to the consolidated base personnel office, which made the following observations:

> Maj. Small is a long shot for 05 [promotion to lieutenant colonel] whether with AFSC/CC or SD/CC [whether indorsed by Air Force Systems Command, Chief Commander or Space Division, Chief Commander] -- 1x passover

> probably for reasons listed in [attached] memo -- not on list of officers identified as still promotable after last board by [Headquarters, Air Force Systems Command, Military Personnel Plans Branch]—therefore AFSC/CC [indorsement] would be doubtful -- no point in using precious SD/CC [indorsement] for someone whom it would not help . . . .

Small, 37 Fed. Cl. at 151-52.

After the command personnel at the Space Division recommended that Mr. Small's OER receive a vice commander indorsement rather than a chief commander indorsement, this recommendation was made known to the rater, who agreed with the recommended step-down in indorsement level. The rater changed his recommended indorser to a vice commander and noted that "Major Small is a one time passover to Lt. Col. He did not have his [Senior Service School] complete last yr. He has now done that. It would take a AFSC/CC to push him over the top and I am not willing to go that high. A SD/CC [Space Division chief commander] would be nice but a CV [vice commander] will be good." *Id.* at 152.

Mr. Small argued below that his commander's reliance upon his prior pass-over in determining the level of indorsement violated several sections of AFR 36-10, which prohibited using promotability potential and prior pass-overs as factors in evaluations. The government argued below that these prohibitions applied only to ratings and not to determinations of indorsement levels. The Court of Federal Claims held that this issue was nonjusticiable because there were no statutory standards by which it could test the legality of the Air Force's conduct.

DISCUSSION

This case comes to us from the parties' cross-motions for summary judgment. The trial court granted the government's motion for summary judgment and denied Mr.

Small's motion. This Court reviews *de novo* the trial court's grant of summary judgment. *See M & J Coal Co. v. United States*, 47 F.3d 1148, 1152 (Fed. Cir. 1995). We review the two legal questions raised in this appeal *de novo*. *See Harbert/Lummus Agrifuels Projects v. United States*, 142 F.3d 1429, 1432 (Fed. Cir. 1998).

1. The Promotion Board Issue

Mr. Small's principal argument is that a selection board is statutorily obliged to conduct its business as a collective body and not through subordinate panels. This argument is based primarily on the wording of 10 U.S.C. §§ 616(c) and 617(a). Section 616(c) provides as follows:

> (c) A selection board convened under section 611(a) of this title may not recommend an officer for promotion unless –
>
> (1) the officer receives the *recommendation of a majority* of the members of the board; and
>
> (2) a *majority* of the members of the board *finds* that the officer is fully qualified for promotion.

(Emphasis added). The other provision, § 617(a), reads as follows:

> (a) Each selection board convened under section 611(a) of this title shall submit to the Secretary of the military department concerned a written report, signed by each member of the board, containing a list of the names of the officers it recommends for promotion and certifying (1) that the board has carefully considered the record of each officer whose name was furnished to it under section 615 of this title, and (2) that, *in the opinion of a majority of the members of the board*, the officers

> recommended for promotion by the board are best qualified for promotion to meet the needs of the armed force concerned ... among those officers whose names were furnished to the selection board.

(Emphasis added).

Mr. Small interprets § 616(c) as requiring that at least a majority of the members of the selection board review each candidate's record and agree on each candidate being recommended. Mr. Small contends that the current process is no more than an empty ritual, with each panel merely adopting the results reported by other panels and submitting the combined results as majority action rather than actually making a majority finding and recommendation. Mr. Small further argues that § 617(a) is violated when (a) none of the members know whom they are "recommending" for promotion and (b) board members affirm their faith in the selection board process rather than certifying the existence of a majority consensus about the officers who are best qualified for promotion.

Our role in analyzing Mr. Small's arguments has been clearly delineated by the Supreme Court. *See Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). In *Chevron*, the Court explained:

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress had not directly

> addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

Id. at 842-43, 104 S.Ct. 2778. [1] With regard to the statutory provisions cited by Mr. Small, Congress has not spoken to the issue of whether the selection board must conduct itself as a collective body. The statutory provisions do not contain any specific methodology that the selection board must use in carrying out its deliberative process. In addition, the parties direct us to nothing in the legislative history that would reveal Congress' intent with regard to these issues and we have found no guidance in our review of the legislative history.

Given the facts before us, we also hold that the Air Force's interpretation of the statute is a permissible one. The statute does not require that a majority determination be based on a knowing review and conscientious consideration of each officer's record. Nothing in the plain language of the statute requires first-hand knowledge on the part of the deliberators of an officer's record. All that is required is a numerical showing that more than half of the board members approved or disapproved of the matter before them. The Air Force, like the other branches of the military, is confronted with establishing a selection process pursuant to statute that

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[1] The Secretary of the Air Force has substantive rulemaking power with respect to the selection boards at issue in this case and thus *Chevron* deference applies. *See Merck & Co., Inc. v. Kessler*, 80 F.3d 1543, 1549, 38 USPQ2d 1347, 1351 (Fed. Cir. 1996) (no *Chevron* deference when agency did not have rulemaking authority in relevant area).

is fair in view of the extensive number of individual officers who may be eligible for consideration. A review of a selected number of individuals by sub-panels who use common and identifiable criteria is an efficacious and equitable means to establish the final rankings that are in fact approved by a majority of the members of the board. This court is not in a position under *Chevron* to impose its statutory construction for that of the Air Force when it finds that the statutory construction provided by the agency is a permissible one. In sum, we agree with the trial court that "[t]here is . . . no reason why the business of coming to a 'majority' consensus cannot be accomplished through collective approval of the findings and recommendations of a sub-group – i.e., a selection panel." *Small*, 37 Fed. Cl. at 156. In addition, using the signing of the Board Report as a means for the members to both express their approval of the recommended candidates and make the required certification is permissible under the statutory scheme as well.

Mr. Small eloquently presents a variety of other arguments in support of his interpretation of these statutory provisions. These arguments range from issues regarding the policy of centralized review in the promotion process to basic principles of governing society as explained by Plato. We have considered these arguments and find them unpersuasive as well.

2. The Officer Evaluation Issue

Mr. Small contends that the use of his prior pass-over as the central factor in determining the recommended level of indorser violates AFR 36-10. This regulation provides at several points that prior pass-overs and the candidate's promotability are not to be considered by the evaluators in the rating chain. For example, AFR 36-10 para. 1-7 states that "selection board eligibility status, such as previous nonselection, ... should not form the basis for a decision to make a recommendation or to assign a particular potential rating." *See also* AFR 36-10, para. 3-14(f) & (j). The

government responds to these arguments by stating that there is a difference between the contents of "ratings" and "evaluations" in an OER and the process by which a particular OER indorsement level is selected. The government contends that AFR 36-10 only limits the contents of the ratings and evaluations in an OER, but does not limit the process by which the level of indorsement is determined. In furtherance of this argument, the government points to AFR 36-10 para. 2-23, which explicitly grants the rater discretion in determining the level of indorsement. This provision states that "commanders [are given] some latitude in determining exactly how the rating chain will be structured within their units. This flexibility provides a further opportunity to achieve differentiation ... *indorsement chains may be established by supplement to this regulation or by common usage in the unit.*" AFR 36-10, para. 2-23 (emphasis added). We think it is clear that the regulation at issue affords a substantial measure of discretion to the command in structuring the rating chain. Because the regulation on its face grants discretion to the command to select a rating chain, Mr. Small must show that the command's discretion was abused in his case. Given the Air Force's construction of the regulation, with which we concur, we discern no abuse of discretion in this regard.

Furthermore, in addition to asking the trial court to correct his military record, which Mr. Small asserts was compiled in violation of the regulation, he asked the trial court to review the merits of his nonselection. The trial court was correct in holding that, in this regard, Mr. Small raises an issue that is nonjusticiable. As we have held previously, the possibility of an error in a military service member's record is not enough to vest the court with power to act. *See Murphy v. United States*, 993 F.2d 871, 873 (Fed. Cir. 1993); *see also Sargisson v. United States*, 913 F.2d 918 (Fed. Cir. 1990). In *Murphy*, the Court of Federal Claims held that an Air Force Reserve Officer was unlawfully released from active duty based on incorrect military records

and ordered reinstatement, back pay, and correction of military records. *Murphy*, 993 F.2d at 871. We reversed, holding that there were no "tests or standards [a court] could apply to determine whether the officer would have been released even on the court's version of the [corrected] record" and therefore the issue was nonjusticiable. *Id.* at 873. Similarly in this case, there are no tests or standards we can apply to determine whether Mr. Small would have been promoted even if his record had contained an indorsement by a chief commander. We therefore find this issue nonjusticiable and affirm the decision of the trial court with respect to this issue as well.

CONCLUSION

We affirm the decision of the trial court with respect to both the promotion board issue and the officer evaluation issue.

AFFIRMED

COSTS

Each party to bear its own costs.

United States Court of Appeals for the Federal Circuit

97-5128

LARRY W. NEPTUNE, WILLIAM R. HOOGSTRA, and ALICE D. LORENZEN,

Plaintiffs-Appellants,

v.

UNITED STATES,

Defendant-Appellee.

DECIDED: November 2, 1998

Before PLAGER, CLEVENGER, and GAJARSA, Circuit Judges.

PER CURIAM.

DECISION

Plaintiffs-Appellants appeal a decision of the United States Court of Federal Claims, Neptune v. United States, 38 Fed. Cl. 510 (1997). Based on our decision in Small v. United States, No. 97-5074, __ F.3d __, 1998 WL 712948 (Fed. Cir. Oct. 14, 1998), we affirm.

COSTS

The parties shall bear their own costs.

United States Court of Appeals for the Federal Circuit

97-5074

WALTER D. SMALL,
Plaintiff-Appellant,

v.

UNITED STATES,
Defendant-Appellee.

ORDER

A combined petition for rehearing and suggestion for rehearing in banc having been filed by the Appellant, and a response thereto having been invited by the court and filed by the Appellee, and the petition for rehearing having been referred to the panel that heard the appeal, and thereafter the suggestion for rehearing in banc and response having been referred to the circuit judges who are in regular active service,

Upon consideration thereof,

IT IS ORDERED THAT.

(1) The petition for rehearing is granted for the limited purpose of amending the court's opinion of October 14, 1998.
(2) The suggestion for rehearing in banc is declined.
(3) The mandate of the court will issue on March 19, 1999.

FOR THE COURT,

March 12, 1999

Jan Horbaly
Clerk

United States Court of Appeals for the Federal Circuit

97-5074

WALTER D. SMALL.

Plaintiff-Appellant,

v.

UNITED STATES,

Defendant-Appellee.

Before PLAGER, CLEVENGER, and GAJARSA, Circuit Judges.

ORDER

Mr. Small has petitioned for rehearing of this court's decision dated October 14, 1998. We grant Mr. Small's petition for the limited purpose of amending our earlier opinion as follows:

1. Delete the paragraph bridging pages 11 and 12 (beginning with "Furthermore" and ending with "this issue as well.")

So ORDERED.

FOR THE COURT

March 12, 1999

Jan Horbaly
Clerk

United States Court of Appeals for the Federal Circuit

97-5128

LARRY W. NEPTUNE, WILLIAM R. HOOGSTRA,
and ALICE D. LORENZEN,
Plaintiffs-Appellants,

v.

UNITED STATES,
Defendant-Appellee.

ORDER

A combined petition for rehearing and suggestion for rehearing in banc having been filed by the APPELLANT, and the Petition for rehearing having been referred to the panel that heard the appeal, and thereafter the suggestion for rehearing in banc having been referred to the circuit judges who are in regular active service,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and the same hereby is, DENIED and it is further

ORDERED that the suggestion for rehearing in banc be, and the same hereby is, DECLINED.

The mandate of the court will issue on March 19, 1999.

FOR THE COURT,

Jan Horbaly
Clerk

March 12, 1999

In the United States Court of Federal Claims

No. 94-618 C

Filed: January 19, 1996

WALTER D. SMALL,
Plaintiff,

v.

THE UNITED STATES,
Defendant.

ORDER

DIRECTING DEFENDANT TO SUPPLY ADDITIONAL INFORMATION REGARDING SELECTION BOARD PROCEDURES

Among the issues presented in this case is a challenge to the process by which the Air Force determines promotions in rank for its officer corps. The mechanics of that process are described in plaintiff's cross motion for summary judgment, filed May 2, 1995, at pages 3-7 and appendix pages 1-28. The court, having examined those mechanics, finds itself in need of additional information in order to properly evaluate the arguments plaintiff has raised against the lawfulness of the Air Force promotion process. Our concern is the following.

Pursuant to 10 U.S.C. § 617(a) (1994), each selection board convened under 10 U.S.C. § 611(a) (1994) is required to certify to the Secretary of the military department concerned that the board has carefully considered the record of each officer whose name was submitted for promotion and that, in the opinion of the majority of the members of the selection board, the officers recommended for promotion by

the board are the "best qualified for promotion ... among those officers whose names were furnished to the selection board." The court takes this language to mean exactly what it says, namely, that the officers recommended for promotion represent those candidates that were found to be the best qualified when considered in relation to the entire class of promotion-eligible candidates. The court is of the view that this statutory mandate - promotion only of the best qualified - cannot be achieved when the selection process is carried out, as it was here, by dividing the class of promotion-eligible officers into a number of separate sub-groups with each sub-group to be evaluated by a separate panel of selection board members.

To explain: The problem that is created by dividing the class of promotion-eligible candidates into separate sub-groups is that, upon completion of the evaluative scoring of the promotion candidates by the various selection board panels, each sub-group will exhibit a mean or average score that will vary, plus or minus, from the mean or average score of the promotion group taken as a whole. This variance between the average of the whole group and the average of a sub-group is due to a difference in the distribution of scores: no sub-group will exhibit a distribution of scores that perfectly replicates the scoring distribution of the entire group. This observation remains true even if we assume that the numerical scoring of the promotion candidates by the various panel members is carried out with complete objectivity.

The consequence of this deviation from the universal mean is that each selection panel can be expected to demonstrate a different score level at the promotion cut-off point. What this means in practical terms, is that a candidate who fails of selection in a particular panel (because he or she happened to be part of a higher scoring sub-group) may well have achieved a score that would place that individual at or above the promotion out-off point of a different selection panel. The short of the matter is that, absent additional

corrective steps, the sub-grouping of promotion candidates hold out the distinct possibility that some individuals who fail to win promotion would, in fact, be promoted were their records evaluated within the context of the entire promotion group while other individuals, who are recommended for promotion, would not receive that recommendation were their records scored against the entire promotion group.

Given the above-described problem, the question that needs to be answered is whether the Air Force is cognizant of the problem its selection mechanics present and, if so, how the. problem is addressed. What steps does the Air Force take, following the identification of each panel's list of recommended promotees, to overcome the "promotion error" that the panel system gives rise to?

Defendant's counsel is directed to file a supplement to its motion for summary judgment responding to the question posed. The supplementary submission is to be filed within the next 20 days or as soon thereafter as the necessary information can be collected

If plaintiff's counsel has information pertinent to the question posed, he is, of course, free to furnish that information to the court.

John P. Wiese
Judge

In The United States Court of Federal Claims

No. 94-618 C

Filed: July 8, 1996

WALTER D. SMALL,
Plaintiff,

v.

THE UNITED STATES,
Defendant.

Guy J. Ferrante, King & Everhard, P.C., Falls Church, Virginia, for plaintiff.

Armando O. Bonilla, with whom were Assistant Attorney General Frank W. Hunger, Director David M. Cohen, Assistant Director James M. Kinsella, Department of Justice, Washington, D.C., and Lt. Col. Steven J. Pecinovsky, Department of the Air Force, Arlington, Virginia, for defendant.

OPINION

WIESE, Judge.

I
Introduction

Plaintiff is a former major in the Regular Air Force who was twice passed over for promotion in rank to the grade of lieutenant colonel and thereafter was involuntarily separated from the military upon completion of the twenty-year service period required for retirement pay

eligibility. [1] In this suit, he seeks review and reversal of a decision of the Air Force Board for Correction of Military Records (Correction Board) denying his application for a correction of records that would have (i) deleted the pass-overs in promotion, (ii) ordered reinstatement to active service, and (iii) granted constructive service credit together with back pay measured from the date of involuntary retirement.

The case is now before the court on cross-motions for summary judgment. There are two principal issues to be decided. [2] The first concerns the administrative procedure that was followed by plaintiff's major command, the Air Force Systems Command, Space Division, in determining the level of indorsement to he accorded an officer's performance evaluation report (OER). The contention, developed in more detail below, is that the procedure introduced, into the OER preparation process, reliance upon personnel data of the sort whose use was specifically prohibited by the governing regulation, Air Force Regulation (AFR) 36-10 (Nov. 1982). The other argument plaintiff raises here is that the selection boards that considered his record for promotion (the calendar year 1987 and 1988 lieutenant colonel selection boards) were in violation of law

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[1] Title 10 of the United States Code, section 632(a), requires the discharge, or retirement, if eligible, of an officer of the Regular Air Force holding the rank of captain or major, after such officer "has failed of selection for promotion to the next higher regular grade for the second time." Pursuant to this section, Major Small became subject to involuntary separation in 1988 but was selectively continued under 10 U.S.C. § 637 until reaching retirement eligibility.

[2] After an initial review of the issues raised in the parties' briefs, the court became convinced that these issues demanded a better common understanding of the factual record and the arguments drawn therefrom. To that end, a conference was called at which each side was given the opportunity to explain the facts it was relying upon and the law it deemed applicable to those facts. As a result of this conference, a number of arguments were withdrawn and others were refined. The result is the case we now have before us for decision.

because, among other things, these boards conducted their business in panels rather than as single, deliberative bodies. This panel system, and the administrative procedures it entails, are claimed to be violations of 10 U.S.C. §§ 616 and 617.

The parties were given an opportunity to brief these issues and oral argument in respect to them was heard on June 27, 1996. After careful consideration, we conclude that plaintiff is not entitled to prevail on either issue.

II

Facts and Discussion

The OER Issue.

Air Force Regulation 36-10 is the administrative guideline that sets out the requirements governing the, preparation and processing of OERs. This regulation contemplates an officer evaluation system keyed to the chain of command, *i.e.*, each officer's performance is evaluated by a "rater" (the officer's immediate supervisor), by an "additional rater" (the rater's rater), and by an "indorser" (the additional rater's rater). This hierarchy, however, is not cast in stone. Commanders are given some latitude in structuring the reporting chains for their respective commands. Thus, while raters must be identified and assigned before the closeout date of a ratee's report (indeed, every officer must know who his primary rater is), this requirement of pre-identification does not apply either to additional raters or to indorsers. In fact, the regulation allows indorsement chains to be established "by supplement to this regulation or by common usage in the unit." AFR 36-10, ¶ 2-23b. "This flexibility," the regulation explains, "provides a further opportunity to achieve differentiation [among ratees] and recognizes that both level of indorsement and indorser grade have an impact on those who use the OER." *Id.* at ¶ 2-23a. In short, the regulation vests commanders with discretion in determining the level of indorsement to be applied to a given OER.

The problem that we encounter here centers on the procedure that the Space Division put into place in order to identify those OERs that merited a higher level of indorsement, *e.g.*, indorsement by, say, a chief commander as opposed to a vice commander. As demonstrated in the record before us, that procedure involved the rater's preparation of a separate form, an OER Indorsement Request Form, that accompanied the OER and that presented a brief summary of an officer's military record including the information complained about here: "Times Passed Over To Next Grade." On the reverse side of this same form the rater was required to indicate a suggested level of indorsement (along with a proposed text for the indorser's comments) and to provide a justification supporting the suggested indorsement and text. Upon completion, this form, together with its related OER, was then forwarded to the base personnel office for review there to assure compliance with prescribed format and completeness of data entries.

In this case, plaintiff's rater, Colonel William E. Sawyer, Commander of the 6592 Air Base Group, prepared an OER for the twelve month period ending April 17, 1987, that graded plaintiff "well above standard" (the highest possible scoring) in each of the listed performance factors. Additionally, on the accompanying OER indorsement request form, Colonel Sawyer suggested that the OER be indorsed by the chief commander of the Space Division -- an office then held by a three-star general. In support of this recommended indorsement, Colonel Sawyer wrote: "Major Small is in the top 5 percent of all majors under my command. Outstanding commander, Headquarters Squadron Section and dual-hatted administrator. Promote now." The OER and the requested indorsement form were then forwarded to the consolidated base personnel office. And it is here - with the actions taken by the base personnel office - that plaintiff's grievance begins.

The base personnel office reviewed the forms and then, by handwritten entry, made the following observations

with respect to Colonel Sawyer's suggested indorsement and the likelihood of its being sufficient to influence the promotion process:

> Maj. Small is a long shot for 05 [promotion to lieutenant colonel] whether with AFSC/CC or SD/CC [whether indorsed by Air Force Systems Command, Chief Commander or Space Division, Chief Commander]
> --1 X passover probably for reasons listed in [attached] memo
> --not on list of officers identified as still promotable after last board by HQ AFSC/APX [Headquarters, Air Force Systems Command, Military Personnel Plans Branch] -- therefore AFSC/CC ind [indorsement] would be doubtful
> --no point in using precious SD/CC ind for someone whom it would not help ([staff] agencies are "entitled" to 6 [three-star] ind and have used 1 of them)
> --ABG/CC [Colonel Sawyer] put little effort into justification or text of ind toward winning 3 [star] ind.

Following the notation of these comments, the form was then circulated among the command personnel of the Space Division to elicit their recommendation as to the appropriate level of indorsement. The routing stamp indicates unanimous agreement among these officers -- the Space Division's director of personnel management, the executive officer, the chief of staff for administration, the chief of staff and the vice commander -- that Major Small's OER receive a vice commander indorsement rather than a chief commander indorsement. Upon the completion of this routing, the requested indorsement form, together with its handwritten commentary, was then returned to the rater, Colonel Sawyer, for further action.

Although the record is not entirely clear on the point, it would appear that, upon receipt of the circulated indorsement

form, Colonel Sawyer agreed with the recommended step-down in indorsement level by changing his recommended indorsement from "CC" to "CV" (from chief commander to vice commander), and by striking the text of his earlier indorsement justification noting, in lieu thereof, the following: "Major Small is a one time passover to Lt. Col. He did not have his SSS [Senior Service School] complete last yr. Has now done that. It would take a AFSC/CC to push him over the top and I am not willing to go that high. A SD/CC would be nice but a CV will be good."

Upon the conclusion of the OER preparation administrative process, there was entered into plaintiff's record an OER that reflected the performance ratings initially made by Colonel Sawyer, the indorser comments as initially drafted by Colonel Sawyer ("Major Small has turned into a key problem solver. He will make a good lieutenant colonel. Promote this board") and the signature of the agreed-upon indorser -- the Space Division's vice commander, Major General Donald J. Kutyna.

The problem plaintiff sees in this administrative scheme is its use of and reliance upon a prior promotion passover as the central factor in determining the recommended level of indorsement. Reliance on that factor, argues plaintiff, deprived him of his rater's unencumbered judgment, reinforced the negative aspects of his service record and, most importantly, transgressed the restriction that AFR 36-10 places against the use of prior promotion passovers in the OER evaluation process.

In substantiation of his position, plaintiff points, first of all, to section 1.7 of AFR 36-10. That section, titled "Guidelines for Evaluation," cautions evaluators (meaning both raters and indorsers) that they "should not attempt to prejudge whether a ratee will or will not be selected by a future [promotion] board." More particularly, the regulation states:

[S]election board eligibility status, such as

> previous nonselection, is not an entry on the selection brief provided to selection boards and should not form the basis for a decision to make a recommendation or to assign a particular potential rating.

To drive home its point, the regulation goes on to provide a list of items that should not play a part in the OER evaluation process or find their way into an evaluator's comments in an OER. Promotability is on this list. The relevant section, section 3-14, titled "Inappropriate Items," reads as follows:

> Certain material is inappropriate and must not be considered in the evaluation process or included in comments in evaluation reports or indorsements to them. Do not consider or refer to:
>
> ....
>
> f. An officer's potential for promotion to general officer, if the officer is serving below the grade of colonel.

Plaintiff contends that the level of indorsement accorded an OER bespeaks an evaluation of that officer as much as do the ratings given to the performance factors called out in the OER. And since it clearly is impermissible under the guidelines of AFR 36-10 to take account of an officer's promotion passovers in determining the ratings to be assigned to those performance factors, so likewise is it impermissible to bring those passovers into play in deciding the level of indorsement to enter on the OER. The short of the matter, argues plaintiff, is that he was deprived of the opportunity to fairly compete for promotion by virtue of an indorsement that was unlawfully determined and that lacked the *gravitas* necessary to distinguish his record relative to his peers.

The Government responds to this attack by invoking essentially the same reason that was given by the Correction Board, namely, that the caution expressed in the regulation against permitting prior passovers to influence the rating

process applies only to the OER in chief, and not to the supplementary process used to determine the OER's level of indorsement. According to the Government, a rating and an indorsement are not the same thing. The rating process is concerned with documenting an officer's performance in a particular assignment during a particular time period and assessing his promotion potential based on that performance; the indorsement process (referring to the process described herein) is an attempt to highlight those officers who are particularly deserving of recognition, *i.e.*, to "achieve [the] differentiation" contemplated by AFR 36-10, ¶ 2-23a.

These are not insubstantial arguments -- each states its case well. Indeed, what gives the arguments their strength is that each finds support in the language of the regulation. But therein also lies the difficulty: on the one hand, the regulation cautions against allowing promotion passovers to affect the objectivity of the performance rating while, on the other hand, it recognizes the desirability of identifying and rewarding superior officers through an enhanced indorsement. Accomplishment of this latter objective necessarily invites canvassing a service member's entire military record (rather than just assessing performance during the rating period) in order to develop the data necessary to support the recommendation for a deserved higher level indorsement. Thus, promotion passovers are bound to come to light.

How is this conflict to be resolved? Unfortunately, the problem does not admit of a judicial solution. As the court pointed out in *Murphy v. United States*, 993 F.2d 871 (Fed. Cir. 1993) the possibility of an error in a military service member's record is not enough to vest the court with power to act. Judicial review, the court explained, "is only appropriate where the Secretary's discretion is limited, and Congress has established 'tests and standards' against which the court can measure his conduct." *Id.* at 873. That is what is missing here. There are no standards that we may look to to test the legality of the Air Force's actions. Indeed, the

regulation and the practice under it reflect policy judgments by the Air Force on matters of personnel management -- an area which traditionally has been recognized to be "off-limits" to the courts. *Orloff v. Willoughby*, 345 U.S. 83, 93, 73 S.Ct. 534, 539-40, 97 L.Ed. 842 (1953) ("judges are not given the task of running the Army."). Therefore, in the absence of a statute prohibiting the Air Force from implementing the regulation in the manner described, the court is without authority to interject itself in this dispute. [3] For lack of any law to apply, the court must abstain.

The Promotion Board Issue

Turning to the other issue in the case, the central contention is that the selection boards that were convened in 1987 and 1988 to consider candidates for promotion to the rank of lieutenant colonel were illegally constituted because those boards conducted their business in panels rather than as single, consolidated bodies. This panel system, described below, is claimed to violate, in a number of respects, the requirements of the statutes prescribing the selection board procedures, 10 U.S.C. §§ 616, 617 (1994). A subordinate contention that plaintiff also raises here is that the selection boards were in violation of a governing Department of Defense Directive, DOD 1320.9 (1981), in that they simultaneously considered for promotion officers in different competitive categories rather than just officers, like Major Small, who made up the so-called "line of the Air Force." [4]

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[3] The regulation was issued by the Secretary of the Air Force pursuant to the authority granted by 10 U.S.C. § 8013(g)(3). This section provides that:

> (g) The Secretary of the Air Force may –
>
> ...
>
> (3) prescribe regulations to carry out his functions, powers, and duties under this title.

[4] Air Force line officers are those officers who are not in the judge advocate, chaplain, or health profession career fields.

As background to our consideration of these issues, we begin with a brief description of the procedure that the Air Force follows in distributing officer selection records for evaluation for promotion. To start with, the officers who are designated to serve on the selection board (generally numbering about 40-45 officers) are broken down into subordinate panels for their independent scoring of records and their recommendation of officers for promotion. [5]

At the outset of a board, and prior to actual scoring of records, board members are formally briefed as to the. scoring procedures and then participate in a practice scoring exercise. During this exercise, each board member reviews the same sample records and scores each record (using a scale of six through ten in half-point increments) and then the board members are informed of the overall results. Thereafter, the sample records are reviewed by the entire promotion board and scoring variations between individual board members are discussed with a view to establishing a board standard of scoring.

Following this training, the actual records of the "In-the-Promotion Zone" (IPZ) and the "Above-the-Promotion Zone" officers [6] are distributed among the panels. The Air Force uses a reverse social security number method of distribution, meaning that the last four digits of each eligible officer's social security number is read from right to left. Groups of twenty records are then sequentially assigned to each of the panels (*i.e.*, records 1 through 20 are assigned

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[5] The 1987 Lieutenant Colonel Central Selection Board was comprised of 42 voting members broken down into six panels. Each panel reviewed the records of approximately 1200 candidates for promotion.

[6] The terms "In-the-Promotion Zone" and "Above-the-Promotion Zone" refer, respectively, to those candidates who are being considered for promotion along with their contemporaries, *i.e.*, when first eligible based upon years of service, and those candidates who are being considered for promotion after their contemporaries, *i.e.*, officers previously non-selected.

to panel one, records 21-40 to panel two, etc.) until all records are distributed.

Panel members score each record separately. As soon as a panel has reviewed and scored a block of twenty records, the scores given to each record by each of the panel members are totaled and the total score given to each record is then aligned in its relative, order of merit (numerical ranking) within the records scored by that panel.

Each panel receives a proportionate share of the entire board's promotion quota based upon the number of records that panel scored. After a panel has completed scoring all of the records that were distributed to that panel and has aligned the records according to their relative order of merit, the panel's proportionate share of the promotion quota is then applied to the scored records, starting from the top of the order of merit and moving down through the numerical rankings until the promotion quota is exhausted. As a rule, when a panel's proportionate quota is applied to that panel's relative order of merit, the numerical scoring level at which the promotion cut-off point occurs contains more records than can be accommodated within the panel's promotion quota. Records in that score category are referred to as records in the "gray" zone. When gray zone records appear, the panel is required to rescore these records in order to eliminate the duplicative scores. For example, if a panel's promotion quota is, say, 50 candidates, and 45 records fall into score categories above the gray zone and ten records are in the panel's gray zone, the panel must rescore the 10 gray zone records in order to determine the five best.

Prior to the convening of each promotion board, the eligibility criteria, method of selection, promotion quota, and statistical data are submitted to and approved by either the Secretary of the Air Force or the Assistant Secretary of the Air Force for Manpower and Reserve Affairs. At the conclusion of each promotion board, the board formally submits a written report to the Secretary of the Air Force

apprising him/her of the results of the promotion board's session.

Moving on now to plaintiff's arguments, the principal contention is that a selection board is statutorily obliged to conduct its business as a unified body and not in panels. The argument relies on the wording of 10 U.S.C. § 616(c) and 10 U.S.C. § 617(a), in particular, the underscored text. Section 616(c) provides:

> (c) A selection board convened under section 611(a) of this title may not recommend an officer for promotion unless -
>
> (1) the officer receives the recommendation of *a majority of the members of the board*; and
>
> (2) *a majority of the members of the board* finds that the officer is fully qualified for promotion. [emphasis added].

The other statute, Section 617(a), reads as follows:

> (a) Each Selection board convened under section 611(a) of this title shall submit to the Secretary of the military department concerned a written report, signed by each member of the board, containing a list of the names of the officers it recommends for promotion and certifying (1) that the board has carefully considered the record of each officer whose name was furnished to it under section 615 of this title, and (2) that, in the opinion of *a majority of the members of the board*, the officers recommended for promotion by the board are best qualified for promotion to meet the needs of the armed force concerned ... among those officers whose names were furnished to the selection board. [emphasis added].

As plaintiff interprets it, the requirement called out in these statutes for action by "a majority of the members of the board" (underscored in the above-quoted text) demands a

selection process in which each officer's record is reviewed by each member of the selection board. Plaintiff argues that the procedure followed by the board of having each panel approve the promotion determinations of the other panels is not an acceptable means of satisfying the demands of a "majority" determination. Referring to this procedure as "promotion for proxy," plaintiff says that it amounts to no more than empty ritual -- each panel blindly adopting the results reported by other panels and passing off the combined results as majority action. The absence of informed judgment on the part of the selectors, argues plaintiff, deprived him of the individual consideration that the statutes mandate and precludes treating the board's action as bona fide majority action.

We do not agree with this argument. There is no indication in the texts of the statutes that Congress intended the term "majority vote" to take on more than its everyday meaning: a vote by more than half of those eligible to vote. That understanding of the term is found at Section 43 of *Robert's Rules of Order*:

> **Majority Vote -- the Basic Requirement**
>
> [T]he basic requirement for approval of an action or choice by a deliberative assembly, except where a rule provides otherwise, is a *majority vote*. The word *majority* means "more than half"; and when the term *majority vote* is used without qualification - as in the case of the basic requirement - it means more than half of the votes cast by persons legally entitled to vote, excluding blanks or abstentions, at a regular or property called meeting at which a quorum ... is present. [italics original.]

Robert's Rules of Order § 43, at 395 (Henry M. Roberts III & William J. Evans eds., 9th ed. 1990).

Nothing in this definition supports the argument that a majority vote requires an assembled deliberative body or, for that matter, first-hand knowledge on the part of the

deliberators of the act or proposition under consideration. To become the act or choice of the body, all that is required is a numerical showing that more than half of the members present and voting have each registered their approval (or disapproval) of the proposition in question. *Cf. Committee to Elect Lyndon La Rouche v. Federal Election Comm'n,* 613 F.2d 834, 847 n. 22 (D.C. Cir 1979) (requirement calling for Committee action to be authorized by majority vote was held to be satisfied when five of six voting members returned without objection a staff memorandum stating that "if no objection is raised within 24 hours, the staff will proceed as outlined above."). Plaintiff has read more into the text of the statutes than the words allow.

The second, and larger issue that we next turn to is whether the panel system holds out the risk of recommending for promotion officers who would not be selected for promotion were their records to be reviewed in the context of the entire group. To put the issue more concretely, is there sufficient assurance of a uniform distribution of records (assessed from a qualitative standpoint) to warrant the selection board's report and recommendation under 10 U.S.C. § 617 that "the officers recommended for promotion ... are [the] best qualified for promotion?"

To explain: The problem that is created by dividing the class of promotion-eligible candidates into separate sub-groups is that, upon completion of the evaluative scoring of the promotion candidates by the various selection board panels, each sub-group will exhibit a mean or average score that will vary, plus or minus, from the mean or average score of the promotion group taken as a whole. [7] The variance between the average score of the whole group and the average score of a sub-group is due to a difference in the

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[7] Although we describe the variance problem by reference to the "mean or average score," it would be more accurate to say that the variance occurs in the promotion cut-off percentiles.

quality of the records distributed: no sub-group will exhibit a distribution in quality of records that perfectly replicates the distribution of the entire group. This observation remains true even it we assume that the numerical scoring of the promotion candidates by the various panel members is carried out with complete objectivity.

The consequence of this deviation from the universal mean is that each selection panel can be expected to demonstrate a different score level at the promotion cut-off point. What this means in practical terms is that a candidate who fails of selection in a particular panel (because he or she happened to be part of a higher scoring sub-group) may well have achieved a score that would place that individual at or above the promotion cut-off point of a different selection panel. Thus, absent additional corrective steps, the sub-grouping of promotion candidates holds out the distinct possibility that some individuals who fail to win promotion would, in fact, be promoted were their records to be evaluated within the context of the entire group while other individuals, recommended for promotion, would not receive that recommendation were their records scored against the entire group.

The Air Force recognizes the existence of the problem [8] and has instituted various measures to address it. Among these are the following:

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[8] A declaration accompanying the Government's brief, prepared by Colonel Michael A. Schiefer, currently Chief of the Plans and Analysis Division, Directorate of Customer Assistance at Randolph Air Force Base, Texas, reports the results of a computer simulation involving the distribution, among six panels, of 6,000 records, 55% of which were APZ records and 45% of which were IPZ. This simulation, which was conducted 100 times (to replicate 100 years of promotion boards) was analyzed to determine how closely the distribution of records matched the overall composition of the board, *i.e.*, the 55% APZ-45% IPZ distribution. The analysis revealed that:

> if 100 years of promotion boards were held, less than 2% of the records would have to be exchanged between the panels in 93 of those years to ensure an equitable quality

After each panel has scored at least 240 of the records allotted to it, an initial scoring run order of merit for each panel is then generated. The point at which the In-the-Promotion Zone (IPZ) and the Above-the-Promotion Zone (APZ) promotion rates fall is identified on each panel's order of merit. This sample gray zone for each panel is then reviewed by the Selection Board Secretariat staff and the board president to determine if the quality of records in each panel's gray zone is the same. Further quality review of records within two points above and below each panel's gray zone is repeated after each additional group of approximately 240 records is scored by the panel, For example, if panel one's gray zone is at a score of 40, all of the records receiving a score of 40 by panel one, as well as records receiving scores ranging from 38 to 42 by that panel, are reviewed by the Selection Board Secretariat staff and the board president.

Once the gray zone is established for each panel, the board president also utilizes a computer model as a management tool to assist with insuring scoring consistency among the panels. This model, used prior to 1992, and during the 1981-1991 boards, included the use of a Project Order of Merit.

The project order of merit is a product of an analysis of the prior year's promotion selection results, weighing various factors such as professional military education, officer performance report ratings, and duty assignments, to

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distribution. In 6 out of 100 years, between 2 and 2 ½ % of the records would have to be exchanged. In only 1 out of 100 years, between 2 ½ and 3% of the records have to be exchanged to ensure equity in quality between the panels.

Colonel Schiefer's declaration goes on to note, however, that:

> [t]hese results must be tempered with the fact that the IPZ/APZ status of an officer's record, although considered the most significant, is a single quality factor considered by the promotion board in its subjective determination as to which officers are the best qualified for promotion.

predict how a sample record would fare under the prior board's analysis. These factors are among numerous quality factors which the analysts derive from the prior year's selection board results, and they provide a tool for the board president to use in insuring consistency in scoring and equal distribution of quality in the records among panels. Quality factors, such as whether an officer had "firewall" officer effectiveness reports (reports with the highest rating to the right), would allow a record to predictably rank higher on the project order of merit than an officer with less than "firewall" OERs.

The board president also compares the actual order of merit of the current board against the computer-generated order of merit from the project order of merit. If the board president, using this quality review method, believes that there exists a scoring inconsistency, he/she can redirect records to a second panel for rescoring. However, the decision to recommend or not recommend candidates for promotion remains exclusively within the province of the promotion board members. The project order of merit is simply a management tool, viewed only by the board president and the Selection Board Secretariat, to assist the board president in insuring: (1) consistency in scoring; (2) that records of equal quality are distributed among the panels; and (3) that only the best qualified officers are recommended for promotion,

Throughout the entire quality review process, the board president also routinely reviews 20% of the total IPZ and APZ records presented to the promotion board. Whenever the board president has any reservation about the score given to a particular record or the quality of records distributed to a particular panel, the board president can direct that records be rescored by another panel. Historically, approximately 2% of the total IPZ and APZ records are routinely reviewed by a second panel at the direction of the board president to insure equality in scoring and quality

distribution and to insure that only the best qualified officers are recommended for promotion.

These then, are the measures that were relied on by the Air Force during the years in question (1987 and 1988) to assure uniformity in the distribution of records among panels. The question is whether they are enough to overcome the variance problem that use of the panel system introduces. Plaintiff insists they are not. Plaintiff points out that insuring uniform distribution of APZ/IPZ records merely tracks one predictor of promotion while other factors such as education, commendations and command experience, which also play a role in the evaluation of an officer's suitability for promotion, go unchecked. For plaintiff then, there is no satisfactory means of overcoming the imperfect distribution of evaluation factors that can be seen in the profile of each subdivision of a single promotion group. Accordingly, plaintiff maintains that nothing less than a review of all records by a single selection board can truly determine which officers are best qualified for promotion.

We do not agree with plaintiff. The court is convinced that adherence to the safeguards identified here assured an equal distribution in quality of records among the promotion panels. Particularly significant to the court's conclusion is the across-the-board review that is made of all those candidates falling within two scoring grades, above or below, each panel's promotion cut-off point. This review, conducted in light of the predictive data made available from the project order of merit (the computer-based weighing of the preceding year's selection criteria), assures that the quality of the candidates being recommended for promotion are substantially the same *notwithstanding any variations in the quality of the records distributed among the panels or any subjective differences in the weighing of evaluation factors among the panel's members.* In other words, the grade distribution among panels becomes irrelevant if the quality of the records at the panel cut-off points is seen to be

the same. These safeguards are sufficient to insure the integrity of the selection process. The court so holds.

The panel system of evaluating selection records was adopted by the Air Force as a means of reviewing all eligible records within a relatively short time in order to avoid the potential for inconsistent scoring that could result from board member fatigue brought on by an extended selection process. This concern, placed in the context of the preceding discussion, leads us to conclude that the Air Force's decision to carry out the promotion selection process through use of the panel system represents a legitimate exercise of personnel management authority that is not inconsistent with law. In short, plaintiff's challenge to the panel system does not state an actionable claim.

The final point we consider is plaintiff's contention that he was considered for promotion by a selection board convened in violation of DOD 1320.9. Among other things, this directive specifies that "[s]eparate selection boards shall be convened for each competitive category and grade." Plaintiff contends that he was evaluated for promotion along with officers from other competitive categories, *i.e.*, chaplains, judge advocates and medical specialists. This inter-category evaluation, he maintains, is a violation of DOD 1320.9.

The short answer to plaintiff's contention is that there is no evidence in the record to support his assertion. The point deserves no further attention.

III
Conclusion

For the reasons stated, defendant's motion for summary judgment is granted and plaintiff's cross-motion for summary judgment is denied. The Clerk is directed to enter judgment dismissing the complaint.

United States Court of Federal Claims

No. 94-618 C

Filed: January 15, 1997

WALTER D. SMALL,
Plaintiff,

v.

THE UNITED STATES,
Defendant.

Guy J. Ferrante, King & Everhard, P.C., Falls Church, Virginia, for plaintiff.

Armando O. Bonilla, with whom were Assistant Attorney General Frank W. Hunger, Director David M. Cohen, Assistant Director James M. Kinsella, Department of Justice, Washington, D.C., and Lt. Col. Steven J. Pecinovsky, Department of the Air Force, Arlington, Virginia, for defendant.

ORDER ON PLAINTIFF'S MOTION FOR RECONSIDERATION

WIESE, Judge,

On July 8, 1996, this court issued an opinion in this military pay case deciding, among other matters, that the Secretary of the Air Force (i) had not violated the "majority" determination requirements of 10 U.S.C. §§ 616(c) and 617(a) in identifying officers eligible for promotion through a panel selection system rather than through a unified selection board, and (ii) had sufficient procedural safeguards in place to assure a uniform distribution in the quality of

officer records among the selection panel. *Small v. United States*, 36 Fed. Cl. 43 (1996).

On July 22, 1996, plaintiff moved for reconsideration of the court's decision. Plaintiff contended that the court had misread the statutes involved (10 U.S.C. §§ 616(c) and 617(a)) and, additionally, had relied on an incomplete factual record in deciding that the quality of officer selection folders was uniformly distributed among the officer selection panels. Following a hearing on plaintiff's motion for reconsideration, the court decided that, in the interests of justice, plaintiff should be allowed additional discovery concerning both the administration and operation of the panel selection system.

A second hearing followed the completion of this discovery with plaintiff once again asserting that the court had erred in its rulings concerning the interpretation of sections 616(c) and 617(a) and had acted prematurely – *i.e.*, without adequate factual foundation – in finding that the panel system did not expose promotion candidates to selection risks beyond those they would have faced had their records been considered by the selection board sitting as a whole.

After considering the parties' views on these issues, the court has decided to reaffirm its earlier conclusion upholding the statutory acceptability of the panel system (we rely, however, on slightly different grounds) and to vacate that part of the earlier opinion relating to the quality of the distribution of records among selection panels. To carry out these changes, it is ordered that the earlier opinion be withdrawn and the accompanying "Opinion on Reconsideration" be issued in its place.

Plaintiff's motion for reconsideration is granted to the limited extent herein noted.

OPINION ON RECONSIDERATION

I
Introduction

Plaintiff is a former major in the Regular Air Force who was twice passed over for promotion in rank to the grade of lieutenant colonel and thereafter was involuntarily separated from the military upon completion of the twenty-year service period required for retirement pay eligibility.[1] In this suit, he seeks review and reversal of a decision of the Air Force Board for Correction of Military Records (Correction Board) denying his application for a correction of records that would have (i) deleted the pass-overs in promotion, (ii) ordered reinstatement to active service, and (iii) granted constructive service credit together with back pay measured from the date of involuntary retirement.

The case is now before the court on cross-motions for summary judgment. There are two principal issues to be decided.[2] The first concerns the administrative procedure that was followed by plaintiff's major command, the Air Force Systems Command, Space Division, in determining the level of indorsement to be accorded an officer's

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[1] Title 10 of the United States Code, section 632(a), requires the discharge, or retirement, if eligible, of an officer of the Regular Air Force holding the rank of captain or major, after such officer "has failed of selection for promotion to the next higher regular grade for the second time." Pursuant to this section, Major Small became subject to involuntary separation in 1988 but was selectively continued under 10 U.S.C. § 637 until reaching retirement eligibility.

[2] After an initial review of the issues raised in the parties' briefs, the court became convinced that these issues demanded a better common understanding of the factual record and the arguments drawn therefrom. To that end, a conference was called at which each side was given the opportunity to explain the facts it was relying upon and the law it deemed applicable to those facts. As a result of this conference, a number of arguments were withdrawn and others were refined. The result is the case we now have before us for decision.

performance evaluation report (OER). The contention, developed in more detail below, is that the procedure introduced, into the OER preparation process, reliance upon personnel data of the sort whose use was specifically prohibited by the governing regulation, Air Force Regulation (AFR) 36-10 (Nov. 1982). The other argument plaintiff raises here is that the selection boards that considered his record for promotion (the calendar year 1986 and 1987 lieutenant colonel selection boards) were in violation of law because, among other things, these boards conducted their business in panels acting essentially independently, rather than in consort as single, deliberative bodies. This panel system, and the administrative procedures it entails, are claimed to be violations of 10 U.S.C. §§ 616 and 617.

The parties were given an opportunity to brief these issues and to offer oral argument in respect to them. After careful consideration, we conclude that plaintiff is not entitled to prevail on either issue.

II
Facts and Discussion

The OER Issue

Air Force Regulation 36-10 is the administrative guideline that sets out the requirements governing the preparation and processing of OERs. This regulation contemplates an officer evaluation system keyed to the chain of command -- *i.e.*, each officer's performance is evaluated by a "rater" (the officer's immediate supervisor), by an "additional rater" (the rater's rater), and by an "indorser" (the additional rater's rater). This hierarchy, however, is not cast in stone. Commanders are given some latitude in structuring the reporting chains for their respective commands. Thus, while raters must be identified and assigned before the closeout date of a ratee's report (indeed, every officer must know who his primary rater is), this requirement of pre-

identification does not apply either to additional raters or to indorsers. In fact, the regulation allows indorsement chains to be established "by supplement to this regulation or by common usage in the unit." AFR 36-10 ¶ 2-23b. "This flexibility," the regulation explains, "provides a further opportunity to achieve differentiation [among ratees] and recognizes that both level of indorsement and indorser grade have an impact on those who use the OER." *Id.* at ¶ 2-23a. In short, the regulation vests commanders with discretion in determining the level of indorsement to be applied to a given OER.

The problem that we encounter here centers on the procedure that the Space Division put into place in order to identify those OERs that merited a higher level of indorsement, *e.g.*, indorsement by, say, a chief commander as opposed to a vice commander. As demonstrated in the record before us, that procedure involved the rater's preparation of a separate form, an OER Indorsement Request Form, that accompanied the OER and that presented a brief summary of an officer's military record including the information complained about here: "Times Passed Over To Next Grade." On the reverse side of this same form the rater was required to indicate a suggested level of indorsement (along with a proposed text for the indorser's comments) and to provide a justification supporting the suggested indorsement and text. Upon completion, this form, together with its related OER, was then forwarded to the base personnel office for review there to assure compliance with prescribed format and completeness of data entries.

In this case, plaintiff's rater, Colonel William E. Sawyer, Commander of the 6592 Air Base Group, prepared an OER for the twelve-month period ending April 17, 1987, that graded plaintiff "well above standard" (the highest possible scoring) in each of the listed performance factors. Additionally, on the accompanying OER indorsement request form, Colonel Sawyer suggested that the OER be indorsed by the chief commander of the Space Division -- an

office then held by a three-star general. In support of this recommended indorsement, Colonel Sawyer wrote: "Major Small is in the top 5 percent of all majors under my command. Outstanding commander, Headquarters Squadron Section and dual-hatted administrator. Promote now." The OER and the requested indorsement form were then forwarded to the consolidated base personnel office. And it is here -- with the actions taken by the base personnel office -- that plaintiff's grievance begins.

The base personnel office reviewed the forms and then, by handwritten entry, made the following observations with respect to Colonel Sawyer's suggested indorsement and the likelihood of its being sufficient to influence the promotion process:

> Maj. Small is a long shot for 05 [promotion to lieutenant colonel] whether with AFSC/CC or SD/CC [whether indorsed by Air Force Systems Command, Chief Commander or Space Division, Chief Commander]
>
> -- 1 X passover probably for reasons listed in [attached] memo
>
> -- not on list of officers identified as still promotable after last board by HQ AFSC/APX [Headquarters, Air Force Systems Command, Military Personnel Plans Branch] -- therefore AFSC/CC ind [indorsement] would be doubtful
>
> -- no point in using precious SD/CC ind for someone whom it would not help ([staff] agencies are "entitled" to 6 [three-star] ind and have used 1 of them)
>
> -- ABG/CC [Colonel Sawyer] put little effort into justification or text of ind toward winning 3 [star] ind.

Following the notation of these comments, the form was then circulated among the command personnel of the Space Division to elicit their recommendation as to the appropriate level of indorsement. The routing stamp

indicates unanimous agreement among these officers -- the Space Division's director of personnel management, the executive officer, the chief of staff for administration, the chief of staff and the vice commander -- that Major Small's OER receive a vice commander indorsement rather than a chief commander indorsement. Upon the completion of this routing, the requested indorsement form, together with its handwritten commentary, was then returned to the rater, Colonel Sawyer, for further action.

Although the record is not entirely clear on the point, it would appear that, upon receipt of the circulated indorsement form, Colonel Sawyer agreed with the recommended step-down in indorsement level by changing his recommended indorsement from "CC" to "CV" (from chief commander to vice commander), and by striking the text of his earlier indorsement justification noting, in lieu thereof, the following: "Major Small is a one time passover to Lt. Col. He did not have his SSS [Senior Service School] complete last yr. Has now done that. It would take a AFSC/CC to push him over the top and I am not willing to go that high. A SD/CC would be nice but a CV will be good."

Upon the conclusion of the OER preparation administrative process, there was entered into plaintiff's record an OER that reflected the performance ratings initially made by Colonel Sawyer, the indorser comments as initially drafted by Colonel Sawyer ("Major Small has turned into a key problem solver. He will make a good lieutenant colonel. Promote this board") and the signature of the agreed-upon indorser -- the Space Division's vice commander, Major General Donald J. Kutyna.

The problem plaintiff sees in this administrative scheme is its use of and reliance upon a prior promotion passover as the central factor in determining the recommended level of indorsement. Reliance on that factor, argues plaintiff, deprived him of his rater's unencumbered judgment, reinforced the negative aspects of his service

record and, most importantly, transgressed the restriction that AFR 36-10 places upon the use of prior promotion passovers in the OER evaluation process.

In substantiation of his position, plaintiff points, first of all, to section 1.7 of AFR 36-10. That section, titled "Guidelines for Evaluation," cautions evaluators (meaning both raters and indorsers) that they "should not attempt to prejudge whether a ratee will or will not be selected by a future [promotion] board." More particularly, the regulation states:

> [S]election board eligibility status, such as previous nonselection, is not an entry on the selection brief provided to selection boards and should not form the basis for a decision to make a recommendation or to assign a particular potential rating.

To drive home its point, the regulation goes on to provide a list of items that should not play a part in the OER evaluation process or find their way into an evaluator's comments in an OER. Promotability is on this list. The relevant section, section 3-14, titled "Inappropriate Items," reads as follows:

> Certain material is inappropriate and must not be considered in the evaluation process or included in comments in evaluation reports or indorsements to them. Do not consider or refer to:
>
> ....
>
> f. An officer's potential for promotion to general officer, if the officer is serving below the grade of colonel.

Plaintiff contends that the level of indorsement accorded an OER bespeaks an evaluation of that officer as much as do the ratings given to the performance factors called out in the OER. And since it clearly is impermissible under the guidelines of AFR 36-10 to take account of an officer's promotion passovers in determining the ratings to be assigned to those performance factors, so likewise is it

impermissible to bring those passovers into play in deciding the level of indorsement to enter on the OER. The short of the matter, argues plaintiff, is that he was deprived of the opportunity to fairly compete for promotion by virtue of an indorsement that was unlawfully determined and that lacked the *gravitas* necessary to distinguish his record relative to his peers.

The Government responds to this attack by invoking essentially the same reason that was given by the Correction Board, namely, that the caution expressed in the regulation against permitting prior passovers to influence the rating process applies only to the OER in chief, and not to the supplementary process used to determine the OER's level of indorsement. According to the Government, a rating and an indorsement are not the same thing. The rating process is concerned with documenting an officer's performance in a particular assignment during a particular time period and assessing his promotion potential based on that performance; the indorsement process (referring to the process described herein) is an attempt to highlight those officers who are particularly deserving of recognition -- *i.e.*, to "achieve [the] differentiation" contemplated by AFR 36-10, ¶ 2-23a.

These are not insubstantial arguments -- each states its case well. Indeed, what gives the arguments their strength is that each finds support in the language of the regulation. But therein also lies the difficulty: on the one hand, the regulation cautions against allowing promotion passovers to affect the objectivity of the performance rating while, on the other hand, it recognizes the desirability of identifying and rewarding superior officers through an enhanced indorsement. Accomplishment of this latter objective necessarily invites canvassing a service member's entire military record (rather than just assessing performance during the rating period) in order to develop the data necessary to support the recommendation for a deserved higher level indorsement. Thus, promotion passovers are bound to come to light.

How is this conflict to be resolved? Unfortunately, the problem does not admit of a judicial solution. As the court pointed out in *Murphy v. United States*, 993 F.2d 871 (Fed. Cir. 1993) the possibility of an error in a military service member's record is not enough to vest the court with power to act. Judicial review, the court explained, "is only appropriate where the Secretary's discretion is limited, and Congress has established `tests and standards' against which the court can measure his conduct." *Id.* at 873. That is what is missing here. There are no standards that we may look to to test the legality of the Air Force's actions. Indeed, the regulation and the practice under it reflect policy judgments by the Air Force on matters of personnel management -- an area which traditionally has been recognized to be "off-limits" to the courts. *Orloff v. Willoughby*, 345 U.S. 83, 93, 73 S.Ct. 534, 540, 97 L.Ed. 842 (1953) ("[J]udges are not given the task of running the Army."). Therefore, in the absence of a statute prohibiting the Air Force from implementing the regulation in the manner described, the court is without authority to interject itself in this dispute.[3] For lack of any law to apply, the court must abstain.

The Promotion Board Issue

Turning to the other issue in the case, the central contention is that the selection boards that were convened in 1986 and 1987 to consider candidates for promotion to the rank of lieutenant colonel were illegally constituted because those boards conducted their business through separate panels rather than as single, consolidated bodies. This panel system, described below, is claimed to violate, in a number

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[3] The regulation was issued by the Secretary of the Air Force pursuant to the authority granted by 10 U.S.C. § 8013(g)(3). This section provides that:

> (g) The Secretary of the Air Force may-- . . . .
> (3) prescribe regulations to carry out his functions, powers, and duties under this title.

of respects, the requirements of the statutes prescribing the selection board procedures, 10 U.S.C. §§ 616, 617 (1994). A subordinate contention that plaintiff also raises here is that the selection boards were in violation of a governing Department of Defense Directive, DOD 1320.9 (1981), in that they simultaneously considered for promotion officers in different competitive categories rather than just officers, like Major Small, who made up the so-called "line of the Air Force." [4]

As background to our consideration of these issues, we begin with a brief description of the procedure that the Air Force follows in distributing officer selection records for evaluation for promotion. To start with, the officers who are designated to serve on the selection board (generally numbering about 40-45 officers) are broken down into subordinate panels for their independent scoring of records and their recommendation of officers for promotion.[5]

At the outset of a board, and prior to actual scoring of records, board members are formally briefed as to the scoring procedures and then participate in a practice scoring exercise. During this exercise, each board member reviews the same sample records and scores each record (using a scale of six through ten in half-point increments) and then the board members are informed of the overall results. Thereafter, the sample records are reviewed by the entire promotion board and scoring variations between individual board members are discussed with a view to establishing a board standard of scoring.

Following this training, the actual records of the "In-the-Promotion Zone" (IPZ) and the "Above-the-Promotion

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[4] Air Force line officers are those officers who are not in the judge advocate, chaplain, or health profession career fields.

[5] The 1987 Lieutenant Colonel Central Selection Board was comprised of 40 voting members broken down into eight panels. Each panel reviewed the records of approximately 1200 candidates for promotion.

Zone" officers [6] are distributed among the panels. The Air Force uses a reverse social security number method of distribution, meaning that the last four digits of each eligible officer's social security number is read from right to left. Groups of twenty records are then sequentially assigned to each of the panels (*i.e.*, records 1 through 20 are assigned to panel one, records 21-40 to panel two, etc.) until all records are distributed.

Panel members score each record separately. As soon as a panel has reviewed and scored a block of twenty records, the scores given to each record by each of the panel members are totaled and the total score given to each record is then aligned in its relative order of merit (numerical ranking) within the records scored by that panel.

Each panel receives a proportionate share of the entire board's promotion quota based upon the number of records that panel scored. After a panel has completed scoring all of the records that were distributed to that panel and has aligned the records according to their relative order of merit, the panel's proportionate share of the promotion quota is then applied to the scored records, starting from the top of the order of merit and moving down through the numerical rankings until the promotion quota is exhausted. As a rule, when a panel's proportionate quota is applied to that panel's relative order of merit, the numerical scoring level at which the promotion cut-off point occurs contains more records than can be accommodated within the panel's promotion quota. Records in that score category are referred to as records in the "gray" zone. When gray zone records appear, the panel is required to rescore these records in order to eliminate the duplicative scores. For example, if a panel's

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[6] The terms "In-the-Promotion Zone" and "Above-the-Promotion Zone" refer, respectively, to those candidates who are being considered for promotion along with their contemporaries -- *i.e.*, when first eligible based upon years of service -- and those candidates who are being considered for promotion after their contemporaries -- *i.e.*, officers previously non-selected.

promotion quota is, say, 50 candidates, and 45 records fall into score categories above the gray zone and ten records are in the panel's gray zone, the panel must rescore the 10 gray zone records in order to determine the five best.

Prior to the convening of each promotion board, the eligibility criteria, method of selection, promotion quota, and statistical data are submitted to and approved by either the Secretary of the Air Force or the Assistant Secretary of the Air Force for Manpower and Reserve Affairs. At the conclusion of each promotion board, the board formally submits a written report to the Secretary of the Air Force apprising him/her of the results of the promotion board's session.

Moving on now to plaintiff's arguments, the principal contention is that a selection board is statutorily obliged to conduct its business as a collective body and not through independent panels.[7] The argument relies on the wording of 10 U.S.C. § 616(c) and 10 U.S.C. § 617(a), in particular, the underscored text. Section 616(c) provides:

> (c) A selection board convened under section 611(a) of this title may not recommend an officer for promotion unless --
> (1) the officer receives the recommendation of *a majority of the members of the board*; and
> (2) *a majority of the members of the board* finds that the officer is fully qualified for promotion. [emphasis added].

The other statute, Section 617(a), reads as follows:

> (a) Each selection board convened under section

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[7] During the argument on reconsideration heard January 7, 1997, plaintiff, for the first time, asserted that its argument was not directed against the use of the panel system *per se* but rather against the manner in which the panels discharge their assigned responsibilities, *i.e.*, essentially as separate selection boards. This "refinement" of plaintiff's position adds nothing new to his earlier arguments. At bottom, plaintiff's contention was, and still is, that a majority of the members of the entire selection board must individually consider each prospective candidate's record.

> 611(a) of this title shall submit to the Secretary of the military department concerned a written report, signed by each member of the board, containing a list of the names of the officers it recommends for promotion and certifying (1) that the board has carefully considered the record of each officer whose name was furnished to it under section 615 of this title, and (2) that, in the opinion of *a majority of the members of the board*, the officers recommended for promotion by the board are best qualified for promotion to meet the needs of the armed force concerned . . . among those officers whose names were furnished to the selection board. [emphasis added].

As plaintiff interprets it, the requirement called out in these statutes for actions by "a majority of the members of the board" (underscored in the above-quoted text) demands a selection process in which at least a majority of the members of the board have (i) considered the record of each officer vying for promotion, and (ii) found each officer being recommended for promotion to be fully qualified for promotion and among the best qualified for promotion. Unless at least a majority of the members of the selection board look at and agree on each record being recommended, plaintiff insists the statutory requirements are left unmet.

Plaintiff further contends that the procedure followed by the board of dividing the class of promotion-eligible candidates among various panels and then having each panel approve the promotion determinations of the other panels is not an acceptable means of satisfying the demands of a "majority" determination. Referring to this procedure as "promotion by proxy," plaintiff says that it amounts to no more than empty ritual -- each panel blindly adopting the results reported by other panels and passing off the combined results as majority action. The absence of informed judgment on the part of the selectors, argues plaintiff, deprived him of

the individual consideration that the statutes mandate and precludes treating the board's action as bona fide majority action.

Although we concede the appeal of plaintiff's argument, we do not agree with it. As they stand, the statutes neither condemn nor condone the use of panels. Nevertheless, plaintiff reads into their text an implied limitation on the manner in which the members of the selection board may be permitted to carry out their assigned responsibilities. According to plaintiff, the majority concurrences required under the statute -- an officer may not be recommended for promotion unless he receives the recommendation of a "majority of the members of the board" and "a majority of the members of the board" finds the officer fully qualified for promotion -- contemplate deliberative participation on the part of the board majority in the conduct of the selection board's business. In other words, actions taken in the name of the selection board must be the product of a knowing and conscientious consideration of an officer's record by not less than a majority of the selection board's members.

We do not think the word "majority" should be read as expansively as plaintiff insists. In its usual or ordinary sense, that term simply means "a number greater than half of a total." *Webster's Third New International Dictionary* 1363 (1976). Thus, for example, a majority vote simply means a vote by more than half of those eligible to vote. *Robert's Rules of Order* § 43, at 395 (Henry M. Robert III & William J. Evans eds., 1990). Nothing in these definitions supports the argument that a majority determination requires an assembled deliberative body or, for that matter, first-hand knowledge on the part of the deliberators of the act or proposition under consideration. To become the act or choice of the body, all that is required is a numerical showing that more than half of the members entitled to act on a matter have each registered their approval (or disapproval) of the proposition in question. There is therefore no reason why the business of coming to a "majority" consensus cannot be

accomplished through collective approval of the findings and recommendations of a sub-group -- *i.e.*, a selection panel.

Even as we see no restriction in the wording of the statutes regarding the use of a panel system to achieve the required majority concurrences, so also is it worth noting that that system garnered no note of disapproval in a congressionally directed study of Air Force promotion practices and procedures that was undertaken by the Assistant Secretary of Defense in 1990.

This study, the details of which are set out in a Senate Armed Services Committee report, had, as one of its principal objectives, the review of officer promotion programs and promotion board procedures to ensure that existing regulations and procedures "are in compliance with statutory requirements." Committee on Armed Services, Report on the Conduct of Proceedings for the Selection of Officers for Promotion in the U.S. Air Force, S. Rep. No. 102-482, at 6 (1992). Although the report identifies numerous shortcomings in the Air Force selection process, no mention is made of the use of the panel system in the selection of field grade officers. Given the absence of any adverse commentary, it is fair to assume that the panel system -- and the procedures that that system engages -- were not seen to be violative of the statutory responsibilities assigned to selection boards under 10 U.S.C. §§ 616(c) and 617(a).

The panel system of evaluating selection records was adopted by the Air Force as a means of reviewing all eligible records within a relatively short time in order to avoid the potential for inconsistent scoring that could result from board member fatigue brought on by an extended selection process. This concern, placed in the context of the preceding discussion, leads us to conclude that the Air Force's decision to carry out the promotion selection process through use of the panel system represents a legitimate exercise of personnel management authority that is not inconsistent with

law. In short, plaintiff's challenge to the panel system does not state an actionable claim.

The final point we consider is plaintiff's contention that he was considered for promotion by a selection board convened in violation of DOD 1320.9. Among other things, this directive specifies that "[s]eparate selection boards shall be convened for each competitive category and grade." Plaintiff contends that he was evaluated for promotion along with officers from other competitive categories -- *i.e.*, chaplains, judge advocates and medical specialists. This inter-category evaluation, he maintains, is a violation of DOD 1320.9.

The short answer to plaintiff's contention is that there is no evidence in the record to support his assertion. The point deserves no further attention.

III
Conclusion

Based on the reasons stated in this opinion on reconsideration, the court reaffirms its prior conclusion granting defendant's motion for summary judgment, denying plaintiff's cross-motion for summary judgment and directing the entry of judgment dismissing the complaint.

United States Court of Federal Claims

No. 95-324 C

(FILED: July 22, 1997)

LARRY W. NEPTUNE, et al.
Plaintiffs,

v.

THE UNITED STATES,
Defendant.

Guy J. Ferrante, Falls Church, Virginia, for plaintiffs.

Armando O. Bonilla, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, Washington, D.C., with whom was Assistant Director James M. Kinsella, Director David M. Cohen, Assistant Attorney General Frank W. Hunger, for defendant. Lt. Col. Steven J. Pecinovsky, General Litigation Division, U.S. Air Force, of counsel.

OPINION

TIDWELL, Judge:

This case arises out of defendant's renewed motion to dismiss for failure to state a claim or, in the alternative, for judgment on the administrative record, filed April 25, 1996, and plaintiffs' renewed cross motion for summary judgment, filed October 9, 1996. There are two substantive issues in dispute, as well as a jurisdictional argument raised in the motion to dismiss. The first substantive issue is whether the Air Force's promotion system violates controlling statutes and regulations. The second issue, concerning only Major

Neptune, centers on whether the 1985 Selection Board's consideration of 192 allegedly ineligible officers was in violation of 10 U.S.C. § 619. After careful consideration, the court denies defendant's motion to dismiss and plaintiffs' cross motion for summary judgment, and grants defendant's motion for judgment on the record.[1]

FACTS

Plaintiffs are former Majors in the United States Air Force who were twice passed over for promotion to the grade of Lieutenant Colonel. Thereafter, plaintiffs were involuntarily separated from the military upon completion of the twenty-year service period required for retirement pay eligibility. An Air Force Major is required to retire after the officer "has failed of selection for promotion to the next higher regular grade for the second time." 10 U.S.C. § 632(a) (1994). Major Neptune was considered and not selected for promotion to the grade of Lieutenant Colonel by the 1985, 1986, 1987, 1989, and 1990 Selection Boards, and was involuntarily retired on October 1, 1990. [2] Major Lorenzen was non-selected by the 1985, 1986, 1987, and 1989 Selection Boards and was involuntarily retired on November 1, 1989. Major Hoogstra was non-selected by the 1985, 1986, and 1987 Selection Boards and was involuntarily retired on November 1, 1989.

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[1] Plaintiffs' claim is not time barred by the three-year statute of limitations, 10 U.S.C. § 1552(b), because of the Soldiers' and Sailors' Civil Relief Act, 50 U.S.C. App. § 525, which tolls a statute of limitations for a service member's period of active duty. However, the Soldiers' and Sailors' Civil Relief Act does not toll the time calculation for laches. *See Cornetta v. United States*, 851 F.2d 1372, 1378 (Fed. Cir. 1988). Defendant contends that because plaintiff waited over five years from his non-selection to bring a claim, he should be barred by the doctrine of laches. However, it is not necessary to discuss this issue because, as discussed below, defendant's actions did not violate § 619.

[2] The Selection Board did not convene in 1988.

Each Air Force Selection Board selects officers using a "panel system." On a typical board, generally comprised of about forty to forty-five members, the officers each serve on smaller subordinate panels of about five members each. Each panel member independently scores the records distributed to the panel and recommends officers for promotion.

Before scoring the records, the panel members engage in a practice scoring exercise to acquaint each member with the scoring methodology. The members score sample records on a six to ten point scale, in half-point increments. The practice results are compared and the Selection Board reviews scoring inconsistencies and variations to set scoring standards.

After the practice scoring exercise is completed, a reverse social security number method is employed to distribute blocks of twenty records to each panel. The reverse social security number method is intended to ensure a random distribution of records among the panels. Each panel member separately scores the twenty records. The scores for each record are totaled and then aligned in a relative order of merit within the records scored by that panel. For example, if each of the five members on a panel gave "record A" a score of 7, the total score for that record would be 35. If the total score given by the same panel to "record B" is 34, "record A" would rank above "record B" in the panel's order of merit.

Overall, the Selection Board will promote a predetermined number of officers. Each panel recommends a proportionate number of officers for promotion. The number of officers selected by each panel under this system directly depends on the number of records reviewed by the panel. Thus, if the Selection Board considers 1000 records, and it is predetermined that 100 officers will be promoted (a 10% promotion rate), and a particular panel reviews 250 of those records, then that panel will recommend 25 officers for promotion.

To determine which individuals will be recommended for promotion, the panel's quota is applied to its order of merit. Individuals are chosen sequentially from the order of merit. This process continues until such time as the remaining available promotion positions are exceeded by the number of officers with a given score. All records ranked at this cut-off score are deemed in the "grey zone." Thus, in our previous example, if a panel reviews 250 records, and eight officers have a score of "10", nine have a score of "9.5", and ten have a score of "9", then those officers with a score of "9" would be in the grey zone. Grey zone records are then rescored to determine a ranking order among them. This ranking is employed to choose the remaining candidates to be recommended by the panel.

At intervals during the above scoring process, the Selection Board draws sample grey zones to review for consistency among the panels. After a panel scores at least 240 records, an initial order of merit for the panel is generated. Applying a fraction of the panel's share of the quota to the initial order of merit, a sample grey zone is drawn. The sample grey zones from each panel are then reviewed by the Selection Board's Secretariat and the president to determine if the quality of records in each panel's grey zone is the same. This quality review includes repeating a review of records within two points above and below each panel's grey zone after each additional group of approximately 240 records are scored by the panels. For example, if a panel's grey zone is at a score of 40, then the records receiving scores ranging from 38 to 42 by that panel are reviewed by the Selection Board's Secretariat and the president.

In addition, the board president uses a computer model to ensure score consistency among the panels. This model, used by the 1981-1991 boards, includes the use of a "Projected Order of Merit" (POM). The POM is based on an analysis of the prior year's promotion selection results, weighing various

factors of selection criteria to predict how an actual record would fare under the prior board's analysis.

The board president compares the actual order of merit from the current board against the computer-generated order of merit from the POM. If the board president, using this quality review method, believes that a scoring inconsistency exists, records may be directed to a second panel for rescoring. The decision to recommend candidates for promotion, however, stays with the Selection Board as a whole. The POM is solely a management tool and is used to ensure: (1) consistency in scoring, (2) an equal quality distribution of records among the panels, and (3) that only the best qualified officers are recommended for promotion.

Each board member does not personally review every record. Relying on the pre-board training given to each board member, the quality review conducted by the Selection Board's Secretariat and president, and their individual experiences as panel members, the board members certify that the promotion process has selected the best qualified officers for promotion. Each member of the 1986 and 1987 Lieutenant Colonel promotion boards signed the board reports, certifying: (1) that the board had carefully considered the record of each officer whose name was furnished to it, and (2) that, in the opinion of a majority of the members of the board, the officers recommended for promotion by the board were the best and fully qualified for promotion.

Prior to convening each Selection Board, the eligibility criteria, method of selection, promotion quota, and statistical data are submitted to and approved by either the Secretary of the Air Force or the Assistant Secretary of the Air Force for Manpower and Reserve Affairs. At the conclusion of each Selection Board, the board formally submits to the Secretary of the Air Force the statutorily required written report, stating the results of the Selection Board's session.

DISCUSSION

I. Standard of Review

A. Defendant's Motion to Dismiss for Failure to State a Claim

The Supreme Court set forth the standard for evaluating motions to dismiss for failure to state a claim in *Conley v. Gibson*, 355 U.S. 41, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957). *Conley* provides that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that [plaintiffs] can prove no set of facts in support of [their] claim which would entitle [them] to relief." *Id.* at 45-46, 78 S.Ct. at 102 (footnote omitted). Furthermore, a court must construe the allegations in the complaint favorably to plaintiffs. *Hamlet v. United States*, 873 F.2d 1414, 1416 (Fed. Cir. 1989) (citing *Scheuer v. Rhodes*, 416 U.S. 232, 236, 94 S.Ct. 1683, 1686, 40 L.Ed.2d 90 (1974)). This court has held that dismissal under RCFC 12(b)(4), dismissal for failure to state a claim, can only be granted if the defendant is able to establish an "insurmountable bar" to plaintiffs' relief. *Chavez v. United States*, 15 Cl. Ct. 353, 356 (1988) (citing *Thomas W. Garland, Inc. v. City of St. Louis*, 596 F.2d 784, 787 (8th Cir.), *cert. denied*, 444 U.S. 899, 100 S.Ct. 208, 62 L.Ed.2d 135 (1979)).

The present case deals largely with issues of statutory interpretation, which are questions of law, rather than fact. The court finds that plaintiffs' statutory interpretation theory is sufficient to make plaintiffs' claim for relief colorable. Regardless of whether their arguments are adopted, plaintiffs clearly have stated a claim upon which relief could be granted. Therefore, defendant's motion to dismiss for failure to state a claim is denied.

B. Judgment on the Administrative Record and Summary Judgment

According to RCFC 56.1(a), the same standards apply for a judgment upon the record as for summary judgement under RCFC 56. Further, judgment upon the record is proper under the same circumstances as summary judgment. *See*

Rose v. United States, 35 Fed. Cl. 510, 512 (1996). Summary judgment is appropriate when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. RCFC 56(c). Legal issues of statutory and regulatory interpretation are amenable to resolution by summary judgment. *See Hill v. United States*, 945 F.2d 1529, 1530 (Fed. Cir. 1991) (summary judgment proper when a case "turns on a legal issue-the proper interpretation of the pertinent statutes and regulations."), *rev'd on other grounds*, 506 U.S. 546, 113 S.Ct. 941, 122 L.Ed.2d 330 (1993). In evaluating a motion for summary judgment, any doubt as to whether a genuine issue of material fact exists must be resolved in favor of the non-moving party. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 158-59, 90 S.Ct. 1598, 1608-09, 26 L.Ed.2d 142 (1970); *Campbell v. United States*, 2 Cl. Ct. 247, 249 (1983). A genuine issue of material fact is one that would change the outcome of the litigation. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986). In deciding a motion for summary judgment, the court does not "weigh the evidence and determine the truth of the matter but [only] determine[s] whether there is a genuine issue for trial." *Id.* at 248, 106 S.Ct. at 2510. Not until the moving party has met its burden of showing entitlement to judgment as a matter of law does the burden shift to the non-moving party to provide facts establishing that a genuine issue for trial exists. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87, 106 S.Ct. 1348, 1355-56, 89 L.Ed.2d 538 (1986). Neither party may discharge its burden by cryptic, conclusory, or generalized responses. *See Willetts v. Ford Motor Co.*, 583 F.2d 852, 856 (6th Cir. 1978); *Tunnell v. Wiley*, 514 F.2d 971, 976 (3d Cir. 1975).

When the parties file cross motions for judgment upon the record and/or summary judgment, as in the instant case, the court must evaluate each motion on its own merits. The fact that both parties argue in favor of summary judgment and allege that there are no genuine issues of material fact

for trial does not relieve the court of its duty to decide whether summary judgment is appropriate. *Prineville Sawmill Co. v. United States*, 859 F.2d 905, 911 (Fed. Cir. 1988) (citing *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1390-91 (Fed. Cir. 1987)). Cross motions are no more than a claim by each party that it alone is entitled to summary judgment, and the making of such inherently contradictory claims does not establish that if one is rejected the other must necessarily be allowed. *Rains v. Cascade Indus., Inc.* 402 F.2d 241, 245 (3d Cir. 1968). The court must "draw all reasonable inferences against the party whose motion is under consideration." *Mingus Constructors*, 812 F.2d at 1391.

As noted, this case is before the court on defendant's motion to dismiss or, in the alternative, defendant's motion for judgment on the administrative record, and plaintiffs' cross motion for summary judgment. Plaintiffs seek correction of their military records. Specifically, plaintiffs ask the court to direct the Secretary of the Air Force to: (1) delete from their records all references to their promotion non-selections and involuntary retirements; (2) correct their records to reflect continuous active duty; and (3) reinstate them to active duty. There are two issues to be decided. The first issue, concerning all three plaintiffs, is whether the Selection Boards' use of a panel system to review a candidate's records for promotion is legal. Plaintiffs contend that the procedures used by the Air Force violate 10 U.S.C. §§ 616(c), 617(a) and Department of Defense (DOD) Directive 1320.9. The second issue to be decided concerns only Major Neptune. Major Neptune contends that the 1985 Selection Board considered 192 allegedly ineligible officers in violation of 10 U.S.C. § 619, rendering his nonselection invalid.

II. Legality of the Panel System for Determining Air Force Promotions

A. Statutory Authorization

The Code specifies that military officers are to be considered for promotion by "selection boards." 10 U.S.C. § 611(a) (1994). A Selection Board may not recommend an officer for promotion unless "(1) the officer receives the recommendation of a majority of the members of the board; and (2) a majority of the members of the board finds that the officer is fully qualified for promotion." 10 U.S.C. § 616(c) (1994). Furthermore, § 617(a) requires:

> a written report, signed by each member of the board, containing a list of the names of the officers it recommends for promotion and certifying (1) that the board has carefully considered the record of each officer whose name was furnished to it under section 615 of this title, and (2) that, in the opinion of a *majority* of the members of the board, the officers recommended for promotion by the board are best qualified for promotion to meet the needs of the armed force concerned (as noted in the guidelines or information furnished the board under section 615(b) of this title) among those officers whose names were furnished to the selection board.

10 U.S.C. § 617(a) (1994) (emphasis added). In addition, DOD Directive 1320.9 centralizes the selection of officers. It states that:

> To ensure fairness in the promotion selection process . . . a single board shall be convened to consider all eligible officers in the same grade and competitive category for promotion ....

DOD Directive 1320.9(D)(1)(a) (Sept. 18, 1981). Because the Air Force Selection Board system splits the candidates' records among different panels, plaintiffs argue that the selection process violates the DOD directive and the applicable statutes.

Plaintiffs argue that the Air Force's current procedure, whereby promotion determinations of the panels are

accepted by the board as a whole, is not an acceptable means of satisfying the demands of a "majority" determination. Plaintiffs read into the statute an implied limitation on the manner in which the members of the Selection Board may be permitted to carry out their assigned responsibilities. According to plaintiffs, an officer may not be recommended for promotion unless he receives the recommendation of a "majority of the members of the board," and that the term "majority" contemplates deliberative participation on the part of each and every board member in each promotion decision. The court does not agree and is in accord with *Small v. United States*, 36 Fed. Cl. 43 (1996), *vacated in part on other grounds*, 37 Fed. Cl. 149 (1997).

Congress has recognized the Air Force's longstanding approach of using panels. *See* H.R. Rep. No. 97-141, 97th Cong., 1st Sess., at 12 (1981) (mentioning the Air Force's use of a panel system), *reprinted in* 1981 U.S.C.C.A.N. 35. Approval is also seen in Congress's recent review of the Air Force panel system, conducted as part of a larger study of promotional practices in the Air Force. One of the study's principal objectives was the review of officer promotion programs and Selection Board procedures to ensure that existing regulations and procedures "are in compliance with statutory requirements." Committee on Armed Services, Report on the Conduct of Proceedings for the Selection of Officers for Promotion in the U.S. Air Force, S. Rep. No. 102-482, at 6 (1992). Although the study cited numerous shortcomings, it did not note the panel system as violating 10 U.S.C. §§ 616(c) and 617(a).

Furthermore, a DOD review submitted to the Senate Armed Services Committee (SASC) entitled "Report on Officer Promotion Programs in the Department of Defense" indicates awareness of the panel system. Under the heading of "Internal Board Procedures," within the section devoted to the Air Force, the Assistant Secretary of Defense explained:

> *Promotion boards are divided into one or more panels depending on the number of officers in*

> *the eligible population.* In the case of field grade boards, the board support personnel distribute the records of the eligible officers in and above the promotion zone (IPZ/APZ) *randomly among the panels.... The deliberative work of the board consists of individual board members reviewing the records assigned to that panel and assigning scores* ... from six to ten in half-point increments. ... Once a record has been *scored by a panel*, it will not be seen again unless a split vote has occurred or the record is part of the grey resolution .... When [a split vote] occurs, the record is brought back to *the panel* for discussion .... Once the panel finalizes the score awarded to a particular officer, the board recorders retire the record (*it is not passed to another panel*)....

Office of the Assistant Secretary of Defense, Force Management & Personnel, U.S. Dep't of Defense, Report on Officer Promotion Programs in the Department of Defense 35 (1991) (emphasis added). Congress's knowledge of the panel system and its failure to criticize it in the report, implies approval of the Air Force panel system. *See Small*, 37 Fed. Cl. at 156 (stating that "[g]iven the absence of any adverse commentary, it is fair to assume that the panel system--and the procedures that that system engages--were not seen to be violative of the statutory responsibilities assigned to selection boards under 10 U.S.C. §§ 616(c) and 617(a).").

B. Methods Employed by the Panels

Plaintiffs allege that even if the panel system is not per se invalid, the manner in which the Air Force uses the panels is invalid. Specifically, plaintiffs complain that the random distribution of servicemen's records by reverse social security number does not ensure equal distribution of record quality between panels, and is therefore invalid.

The decision to promote an officer, as well as the method by which the decision is made, implicates highly

discretionary questions of military judgment and expertise which civilian courts may not second-guess. *See Murphy v. United States*, 993 F.2d 871, 872-74 (Fed. Cir. 1993), *cert. denied*, 511 U.S. 1019, 114 S.Ct. 1402, 128 L.Ed.2d 75 (1994); *Sargisson v. United States*, 913 F.2d. 918, 921-22 (Fed. Cir. 1990); *Kreis v. Secretary of the Air Force*, 866 F.2d 1508, 1511-12 (D.C. Cir. 1989); *Bunch v. United States*, 33 Fed. Cl. 337, 340 (1995); *Rice v. United States*, 31 Fed. Cl. 156, 165-67 (1994), *aff'd*, 48 F.3d 1236 (Fed. Cir. 1995). The United States Court of Appeals for the Federal Circuit recently examined the justiciability of military personnel decisions in *Murphy*. 993 F.2d at 872-74. The *Murphy* court set forth the well-established doctrine that "[j]usticiability ... depends on 'whether the duty asserted can be judicially identified and its breach judicially determined, and whether protection for the right asserted can be judicially molded.'" *Id.* at 872 (quoting *Baker v. Carr*, 369 U.S. 186, 198, 82 S.Ct. 691, 700, 7 L.Ed.2d 663 (1962)). Emphasizing the deference that must be afforded in military personnel decisions, the appellate court restated the Supreme Court's admonishment to courts in the area of judicial interference in military personnel decisions.

> [T]here are "thousands of . . . routine personnel decisions regularly made by the services which are variously held nonjusticiable or beyond the competence or the jurisdiction of courts to wrestle with." We have emphasized that judicial review is only appropriate where the Secretary's discretion is limited, and Congress has established "tests or standards" against which the court can measure his conduct. Unless such a test or standard is provided, courts must abstain.

Murphy, 993 F.2d at 873 (citations omitted).

Addressing the issue of erroneous military records, the *Murphy* court further noted that "the possibility of erroneous records does not transform an otherwise nonjusticiable action into a reviewable one.... 'A court lacks the special expertise

needed to review reserve officers' records and rank them on the basis of relative merit.'" *Id.* (quoting *Sargisson*, 913 F.2d at 922). Although *Murphy* dealt specifically with the evaluation of reserve officers' records, the court's holding logically applies to regular officers as well.

In the present case, the Air Force's decisions on how to select officers for promotion present the court with nonjusticiable questions. *See Bunch*, 33 Fed. Cl. at 340. The relevant statutes provide no tests or standards to evaluate the decisions of the Air Force in making promotion determinations. *See Murphy*, 993 F.2d at 872-74; *Voge*, 844 F.2d at 780 ("A controversy is 'justiciable' only if it is 'one which the courts can finally and effectively decide, under tests and standards which they can soundly administer within their special field of competence.'" (quoting *Greene v. McElroy*, 254 F.2d 944, 953 (D.C. Cir. 1958), *rev'd on other grounds*, 360 U.S. 474, 79 S.Ct. 1400, 3 L.Ed.2d 1377 (1959))). The selection and composition of boards and the promotion decisions rendered by those boards involve many factors about which the judiciary lacks the specialized knowledge and expertise relevant for review, and thus are nonjusticiable. The possibility of inequality of record distribution does not make the present issue justiciable.

III. The 1985 Selection Board's Inclusion of 192 Officers Whose Third Year Anniversary Date Was Three Days After the Selection Board Convened.

Only one plaintiff, Major Neptune, raised a challenge under 10 U.S.C. § 619 with the Air Force Board of Correction of Military Records, and therefore the issue at bar is relevant only to Major Neptune. Under 10 U.S.C. § 619, a Major "may not be considered for selection for promotion . . . until he has completed . . . [t]hree years" of service in grade. 10 U.S.C. § 619(a)(2)(A) (1994 & Supp. I 1995). In other words, if an officer was promoted to Major on January 1, 1982, the officer may not be considered for a promotion to Lieutenant Colonel until the officer's third year anniversary,

or January 1, 1985. In the present case, 192 officers whose third year anniversary date was November 1, 1985 were reviewed by the 1985 Selection Board which convened on October 28, 1985, and adjourned on November 8, 1985. Plaintiff argues that the board was convened three days prior to the three-year anniversary and therefore none of the 192 officers should have been considered. Their consideration, plaintiff argues, had a direct impact on his own chance of promotion.

Defendant argues, however, that the "consideration" of candidates is not complete until the Selection Board members certify the promotions pursuant to 10 U.S.C. § 617(a). Defendant "believe[s] it is fair to state that any officer eligible for the board can be thought of as being 'considered for selection' at all times between [the] two dates." Memorandum from Richard J. Vogt, Promotion Division Chief, Directorate of Personnel Program Management, U.S. Air Force, to the Air Force Board of Correction of Military Records 2 (Aug. 13, 1991) (AFBCMR Record at 73). Certification of the Selection Board proceedings did not take place until November 8, 1985, several days after the officers' third year anniversary. Thus, defendant asserts that there was no violation of § 619.

The court agrees. Each Selection Board meets for several days. Although records are scored by the members at the beginning of the board, candidates are not immediately selected or non-selected for promotion. Not until all records have been scored, and the promotion quota is computed, can it be determined which scores will be high enough for promotion. The selection process is not complete until a report is prepared "containing a list of the names of the officers [the board] recommends for promotion," 10 U.S.C. § 617(a), and the report is submitted to the Secretary of the Air Force.

Plaintiff argues that defendant's attempt to equate "consideration" with "certification" is distorted. The court does not agree. The term "consideration" refers to "(1)

observation, contemplation . . . (2) *continuous* and careful thought: *deliberation*; attention." *Webster's Third New International Dictionary* 484 (1976) (emphasis added). Consideration for promotion is a process, not a single act. It cannot be that the only part of the promotion process that equates to "consideration" is the actual scoring of the officer's record. The scoring of a record, standing alone, is meaningless. The entire process, as a whole, constitutes the consideration period.

Although scoring of at least some of the 192 officers' records by the Board undoubtedly occurred before November 1, 1985, *consideration* of the records could not be complete until all the records were scored, and the report was prepared and submitted to the Secretary of the Air Force on November 8, 1985. This occurred after the 192 officers' third year anniversary. Therefore, no violation of 10 U.S.C. § 619 occurred.

CONCLUSION

The court denies defendant's motion to dismiss for failure to state a claim. In light of the foregoing discussion, the court finds that the Air Force panel system does not violate the applicable statutes and regulations, and that the 1985 Selection Board did not violate 10 U.S.C. § 619. Therefore, the court allows defendant's motion for judgment on the administrative record, and denies plaintiffs' cross motion for summary judgment.

IT IS SO ORDERED.

RECORD OF PROCEEDINGS
AIR FORCE BOARD FOR CORRECTION OF MILITARY RECORDS

IN THE MATTER OF: DOCKET NUMBER: 91-01818

WALTER D. SMALL COUNSEL: NONE

245-78-4702 HEARING DESIRED: YES

APPLICANT REQUESTS THAT:

His officer Effectiveness Reports (OERS) closing 17 Apr 86, 17 Apr 87 and 17 Apr 88 be declared void and removed from his records.

His nonselections for promotion to the grade of lieutenant colonel be set aside.

He be retroactively promoted to the grade of lieutenant colonel.

He be reinstated to active duty in the grade of lieutenant colonel.

Derogatory/unfavorable information contained in his records be deleted.

(Examiner's Note: Applicant's request for removal of his OER closing 17 Apr 86 and reinstatement were taken from his rebuttal response).

APPLICANT CONTENDS THAT:

The OER closing 17 Apr 86 contained a forged signature.

False, erroneous, improper, inappropriate, derogatory, and unfavorable information was used in the indorsement and rating process of his OERs closing 17 Apr 87 and 17 Apr 88, in violation of the governing directives. Specifically, the OER closing 17 Apr 87 was staffed using an unauthorized indorsement form which contained inaccurate, improper, and inappropriate statements. This resulted in false information being transmitted to the indorser. The rating process and final level of OER indorsement were adversely affected. The indorsement document featured unsubstantiated statements which prejudged his promotion failure, and damaged his promotion potential. A memorandum, dated 24 Dec 86, from the Space Division Director of Personnel Management (SD/DP) providing background information to the indorser contained improper, unsubstantiated statements contributing to an adverse influence of the rating process. The OER closing 17 Apr 88 was indorsed by an unauthorized official not in his chain of command nor meeting additional rater requirements. His supervisor's reporting official was the Space Division commander. The level of final indorsement on his OER closing 17 Apr 88 was unduly influenced by an indorsement form's comments. The reporting and personnel officials were predisposed toward a lowered level of indorsement. These improprieties concerning his OERS closing 17 Apr 87 and 17 Apr 88 denied him a fair and equal opportunity to compete for promotion to the grade of lieutenant colonel.

The selection boards which considered him for promotion to the grade of lieutenant colonel were not conducted in accordance with statutory requirements.

Applicant's complete submission, to include his AFR 31-11 appeal application and attachments, to at Exhibit A.

STATEMENT OF FACTS:

Applicant entered on active duty on 31 Aug 71 and was progressively promoted to the grade of major. Computer research reflected that the applicant retired on 1 Sep 91.

Applicant was considered and nonselected for promotion to the grade of lieutenant colonel by the CY86 (27 Oct 86), CY87 (30 Nov 87), CY89 (15 May 89), CY90 (16 Jan 90), and CY91A (15 Apr 91), Central Lieutenant Colonel Selection Boards.

The first contested report was rendered for the period 18 Apr 85 through 17 Apr 86 and contained evaluation of potential of ratings of "1-1-1. "

The second contested report was rendered for the period 18 Apr 86 through 17 Apr 87 and contained evaluation of Potential ratings "1-0-1."

The third contested report was rendered for the period 18 Apr 86 through 17 Apr 88 and contained evaluation of potential ratings "1-0-1."

Complete copies of the contested reports are at Exhibit A and tabbed for easy reference.

Applicant's OER/OPR profile since 1980 follows:

PERIOD ENDING	EVALUATION
3 Dec 80	1-0-1
3 Dec 81	1-0-1
30 Sep 82	1-0-1
17 Apr 83	1-0-1
17 Apr 84	1-1-1
17 Apr 85	1-1-1
*#17 Apr 86	1-1-1

*##17 Apr 87	1-0-1
*17 Apr 88	1-0-1
###19 Sep 88	Meets standards
####19 Sep 89	Meets standards

* Contested Reports.

Top Report - CY86 (27 Oct 86) Board.
Top Report - CY87 (30 Nov 87) Board.
Top Report - CY89 (15 May 89) Board.
Top Report - CY90 (16 Jan 90) Board.

(Examiner's Note: Applicant's original military personnel records were not available. The above information was taken from the applicant's microfiche records).

By letters, dated 8 Apr 92 and 22 Mar 93, the applicant contacted his senator regarding his appeal. The congressional correspondence and attachments are at Exhibit C.

AIR STAFF EVALUATION:

The Promotion Division, AFMPC/DPMAJ, provided an initial evaluation. They stated, in part, that the indorsement form was a "suggested indorsement" for the Space Division (SD) vice commander. The form stated that the applicant was a "long shot" for lieutenant colonel, he was a one time nonselect, not on a "list" of officers identified as still promotable, and there was no point using a precious SD/CC indorsement for someone whom it would not help. A Report Of Inquiry conducted in Jul 89 by the Inspector General (IG) stated this form was a draft test form used within Space Systems Division. The IG determined that there was no evidence the draft test form was misused in the applicant's

case. Further, the inquiry found erroneous and improper comments were made on the draft test form resulting in false information being transmitted. The applicant did not request in his first appeal that his first nonselection be set aside. When he was later scheduled for Special selection Board (SSB) consideration, the inquiry stated that his nonselection should not have been mentioned on the test form. If the nonselection had originally been set aside, the comment would have been appropriate. However, it was not, and the fact that he was scheduled for SSB consideration does not nullify his original nonselection. The Report of Inquiry summarized no evidence was found to substantiate the draft test form was misused. The applicant later challenged the Jul 89 Report of Inquiry and another one was accomplished in early 1990. Further study into the draft test indorsement form determined that the form was not originally processed in accordance with regulatory guidelines for "test" forms and its use was not authorized. The report summarized there was no evidence the findings, conclusions and recommendations of the original Report of Inquiry were not correct with the exception of the authorized status of the "draft test form." Additionally, the comments documented on the test form "probably" influenced the level of indorsement. At the time the OERs were rendered, it was the indorser's prerogative to close out the report or forward for possible higher indorsement. The OER closing 17 Apr 87 was indorsed by a two-star general as was the previous OER. The OER closing 17 Apr 88 was indorsed by a colonel (Chief of Staff). When the OER closing 17 Apr 87 was rendered, the applicant had already been nonselected by the CY86 (27 Oct 86) Lieutenant Colonel Board.

This, along with various other factual information was included on the test form prepared for the indorser's use. There was no prohibition on the content or even the use of a draft test form. They do not know if this information included on the draft test form had an impact on the

indorsement level of the OER closing 17 Apr 87. The applicant needs to address this to the indorser. If the indorser does not want to support the appeal, he could provide factual information. The memorandum dated 24 Dec 86 was prepared for a general officer to assist the applicant in a career counseling after the applicant's first nonselection. The memorandum (prepared by the director of personnel management) was a composite of the applicant's record and contained some personal observations. They found no inconsistency between the memorandum and the regulation. Applicant did not include the attachments to the memorandum in his appeal. He did not provide any supporting documentation from the evaluators of the contested reports. They believe the OERs, as rendered, are accurate assessments of the applicant's duty performance. They recommended dental.

AFMPC/DPMAJ provided an additional evaluation and attached technical advisories from AFMPC/DPMAE, Evaluation Programs Division, and AFMPC/DPMAB, Selection Board Secretariat. AFMPC/DPMAJ stated, in part, that the applicant's allegations that his OERS closing 17 Apr 87 and 17 Apr 88 are unjust and inaccurate are summarized as follows: (a) The final indorsement decision was based on information prohibited from consideration by the governing regulation, (b) The indorsement level was subject to quota restrictions in violation of the governing regulation. (c) The information he claimed was prohibited was transmitted on illegal forms, thereby further tainting the OERs. (d) since a 16 Aug 91 letter from the chief of the Selection Board Secretariat stated his consideration by the CY86 board was "declared null and void," reference to his nonselection was, in addition to "being prohibited from consideration by the governing regulation," an inaccurate statement.

The applicant's arguments that a regulatory violation occurred by the transmittal of information concerning his

previous nonselection to lieutenant colonel are without merit. The regulation only comments on the use of this kind of information in assigning "ratings" and an indorsement is not a "rating." In the same light, "rating" quotas or forced distribution of "ratings" were prohibited. Applicant has not shown quotas were being applied to "ratings." He has not provided any definitive statements that prove the "inaccurate" information had an impact on his performance reports.

The only difference between the conclusions of the two IG inquiries is in regard to the test form. The second officer determined that it was improper, but only because proper administrative procedures were not followed in its implementation. Both officers agreed that some of the information contained on the form may have influenced the applicant's chances for an SD/CC indorsement. The information identified by the first inquiry involved the following: (a) mention of pass-over despite being granted an SSB; (b) noncompletion of Senior Service School; (c) his "1 of 3 ranking"; (d) mention of the "list of promotable officers" or some other ranking list. They believe their previous argument addressed the IG's conclusions in (a) and (b). The inquiry officer stated the "1 of 3" ranking, when compared to the written comments, was a "confusing signal." They agree. The IG's conclusion concerning (d) supported the conclusion that the applicant has not provided sufficient evidence to conclude a "ranking system" or a priority listing of officers was being held somewhere in SD.

Applicant readdressed the issue of a forged signature on his OER closing 17 Apr 86. They believed this issue is of key importance to the applicant's request for a direct promotion. In order to convince the board this extreme form of relief is appropriate, the applicant has attempted to prove his 1987 and 1988 reports were flawed, hence his above the promotion zone (APZ) considerations were flawed.

However, in order to prove his in the promotion zone (IPZ) consideration was likewise unfair, he is using this issue in an attempt to show that his OER closing 17 Apr 86, the top report for his IPZ consideration, was also flawed. This issue is straightforward. Applicant claimed that the OER closing 17 Apr 86 was filed with the rater's forged signature, and that AFMPC never investigated the possible impact of this forgery. They believe the impact was fully addressed by his rater, who indicated that the original had a typographical error and he refused to sign blank forms. Thus, in order to expedite the correction, a word-for-word copy was prepared and someone else signed it. In the rater's own words: "There was no change to the content of my report." Since there was no change in the content, it is clear the 'forgery" had no impact. It was the conclusion of those who processed his original appeal that the rater's letter sufficiently allayed any concerns of wrongdoing on the part of those who handled the original report. It is clear that this "forgery" did not occur with any intent to somehow cheat the applicant out of any fair consideration.

The applicant's claims that the central selection boards somehow fail to comply with statutory requirements are based entirely upon opinion and incorrect legal interpretations. In reference to the applicant's allegations, they believe it is important to note what competent legal authorities say. HQ USAF/JAG has previously addressed this contention and concluded it is important to note at the outset that there is no provision of law which specifically requires each member of a promotion board to personally review and score the record of each officer that is being considered by the board. The opinion stated that the language was enacted as part of the Defense officer Personnel Management Act (DOPMA), and that the House Armed Services Committee report (HASC) on the subsequent DOPMA Technical Corrections Act specifically reference panels as a type of administrative subdivision of

selection boards. The opinion further stated that the conclusion is inescapable that, at the time DOPMA was enacted, the Congress was aware of the existence of promotion board panels and their use as administrative subdivisions of promotion selection boards and had no problem with them. Because the Congress was aware of the panels and their use as administrative subdivisions of promotion selection boards, they had no expectation that each board member would review each and every record considered by the board. Furthermore, the specific language of the statute speaks to the corporate board and not to individuals. There is no requirement that individual members "carefully consider the record of each officer whose name is before them." This is a requirement that is levied on the corporate board. In essence, each member is required to certify that the corporate board has considered each record. This same logic applies to the follow-on requirement that the board members certify that, in their opinion, the recommended officers are best qualified for promotion.

Applicant claimed that as a direct result of illegal actions taken during processing of his 1986 through 1990 performance reports, it is impossible for him to compete fairly for promotion. Thus, only the Air Force Board for Correction of Military Records (AFBCMR) is able to correct the injustices by directing his promotion to lieutenant colonel. In their view, a direct promotion is the most extreme form of relief. They believe that circumvention of the competitive promotion processes outlined in Federal laws should rarely be considered as an alternative. Only when the applicant can prove beyond any doubt that none of his promotion considerations were fair, and there exist no means by which the applicant can correct the causative or unjust errors and obtain fair consideration, should a direct promotion even be contemplated. A review of the applicant's request clearly shows his case does not pass any of these critical tests. The first and most important gate is his IPZ

consideration by the CY86 board. He has challenged nothing prior to the OER closing 17 Apr 86 and, based on the statement of his rater, it is clear that this report and thus, his entire record to this point, was completely accurate. As such, there is every reason to believe this initial pass-over occurred as a result of fair consideration. Applicant next claimed that his OERs closing 17 Apr 87 and 17 Apr 88 were illegal because of regulatory violations and prejudicial information being passed to the SD/CC, the proposed indorser of the two reports. As a result, he believes that he never had a fair chance to obtain SD/CC indorsement. In their opinion, the applicant has not proven the claimed regulatory violations occurred. In their first advisory, they indicated that all of the applicant's information should be provided to the former SD/CC for comment. In his rebuttal, the applicant opined that it would be fruitless. They firmly believe that before a direct promotion is contemplated, every avenue of possible relief should be exhausted. Applicant has not done that. They again recommended that the proposed indorser be approached. If he agrees that the reports were unfairly processed, and agrees to indorse them, they believe this would correct the claimed injustices. In that case, they would not object to SSB reconsideration by the appropriate boards. However, they recommended denial of the application as it currently appeared.

AFMPC/DPMAE provided a technical advisory addressing the applicant's allegations regarding OER/OPR policies. They stated, in part, that, from a technical standpoint, they found that his evaluations were not flawed. Although the applicant contended the OERs he received at AFSC/SSD were clearly and unjustly prejudiced by an illegal form, the information on that form did not violate any provision of the governing regulation. Additionally, while a limit of indorsement, a prioritized listing, and a series of mini-boards were apparent, these did not violate the regulatory provisions

in effect at that time. His inference that OERs and PRFs were flawed is entirely unsubstantiated.

AFMPC/DPMAB provided a technical advisory, quoted from a letter from HQ USAF/JAG, dated 26 Feb 92, addressing the applicant's allegation regarding promotion board policies.

Complete copies of AFMPC/DPMAJ'S evaluations and attachments are at Exhibit D.

The General Law Division, HQ USAF/JAG, provided an additional evaluation. They stated, in part, that Title 10 U.S.C. 1034 prohibits taking retaliatory personnel actions against military members making protected communications to Members of Congress or an Inspector General. The personnel actions which form the basis for the applicant's case are performance reports closing 17 Apr 87 and 17 Apr 88. Applicant stated he initially petitioned the IG through his senator in Dec 88. As the personnel actions complained of predate the applicant's communications with the IG or Congress, there seems little logic in the applicant's assertion that the personnel actions were in retaliation for making or preparing to make protected communications. Applicant offers no evidence to support this assertion. Therefore, from the facts presented, they believe 10 U.S.C. 1034 has no application to subject case.

A complete copy of their evaluation is at Exhibit E.

APPLICANT'S REVIEW OF AIR STAFF EVALUATION:

Applicant provided an initial, detailed response, dated 29 Sep 91. He stated, in part, that he has provided clear and convincing evidence that the OERs he received while at Space Division (AFSC/SSD) were clearly and unjustly

prejudiced by use of an unauthorized, illegal form which forced evaluators to consider promotion status, etc., when processing OERs, considerations which were in direct violation of the governing regulation; that the OERs/OPRs/PRFs were all limited by an illegal quota system, and influenced by a rigid "prioritization listing" and a series of "mini-boards, all in direct violation of the governing regulation; that as a result of these illegal subsystems, he was unable to compete fairly for OERs, OPRs, and PRFs; that his OER closing 17 Apr 86 included a forged signature, by whom and for what reason has never been established. However, as a result of this forgery, this OER, too, is a fraudulent and illegal document which must be removed from his file; that as a result of the illegal actions taken during processing of his OERs, OPRs, and PRFs, it is impossible for him to compete fairly for competitive selection for promotion. Therefore, only the AFBCMR is in a position to determine his promotion potential for lieutenant colonel, and, based on the information provided, the Board should direct his selection to lieutenant colonel as if selected IPZ by the CY86 Lieutenant Colonel Selection Board; and that the selection boards which considered him for promotion to the grade of lieutenant colonel were not conducted in accordance with 10 U.S.C. requirements, and therefore, all nonselections were legally invalid. Based on the preponderance of evidence provided, it is clear that the only fitting and appropriate relief would be promotion to the grade of lieutenant colonel and reinstatement to active duty in that grade.

By letter, dated 2 Oct 91, the applicant requested that the attached additional documentation be appended to his rebuttal response as attachment 11, and that he no longer had counsel.

By letter, dated 15 Jan 92, the applicant requested that the attached additional documentation be appended to his rebuttal response at attachment 12.

By letter, dated 29 Dec 92, the applicant requested a review of his appeal to determine the applicability of 10 U.S.C. 1034 to his case,

Applicant's total responses are at Exhibit G.

THE BOARD CONCLUDES THAT:

1. The applicant has exhausted all remedies provided by existing law or regulations.

2. The application was not timely filed regarding his requests to void his OERs closing 17 Apr 86 and 17 Apr 87, and to set aside his nonselections for promotion to the grade of lieutenant colonel by the CY86 and CY87 Central Lieutenant Colonel Boards. However, it is in the interest of justice to excuse the failure to timely file.

3. The application was timely filed with regard to his remaining requests.

4. Insufficient relevant evidence has been presented to demonstrate the existence of probable error or injustice. We took notice of the applicant's complete submission in judging the merits of the case; however, we agree with the opinions and recommendations of the respective Air Staff offices and adopt their rationale as the basis for our conclusion that the applicant has not been the victim of an error or injustice. We believe that the particular issues raised by the applicant have been sufficiently addressed by the respective Air Staff offices. Thus, in our opinion, further articulation of these issues would be redundant. After a thorough review of this application, we did not find persuasive evidence that the

applicant was denied rights to which he was entitled, pertinent regulations were violated, or that appropriate standards were not applied, nor did we find that the applicant was not considered for promotion on a fair and equitable basis. In view of the foregoing, we find no basis to recommend granting the relief sought in this application.

5. The applicant's case is adequately documented and it has not been shown that a personal appearance with or without counsel will materially add to our understanding of the issues involved. Therefore, the request for a hearing is not favorably considered.

THE BOARD DETERMINES THAT:

The applicant be notified that the evidence presented did not demonstrate the existence of probable material error or injustice; that the application was denied without a personal appearance; and that the application will only be reconsidered upon the submission of newly discovered relevant evidence not considered with this application.

The following members of the Board considered this application in Executive Session on 30 Nov 93, under the provisions of AFR 31-3:

Mr. Oscar A. Goldfarb, Panel Chairman
Mr. Thomas S. Markiewicz, Member
Mr. John L. Robuck, Member

The following documentary evidence was considered:

Exhibit A. DD Form 149, dated 14 Sep 90, w/atchs.
Exhibit B. Applicant's Master Personnel Records.

Exhibit C. Congressional correspondence, dated 19 Nov 92 and 26 May 93, w/atchs.
Exhibit D. Letters, AFMPC/DPMAJ, dated 24 Jun 91 and 25 Jan 93, w/atchs.
Exhibit E. Letter, HQ USAF/JAG, dated 23 Mar 93.
Exhibit F. Letters, AFBCMR, dated 29 Jul 91, 1 Apr 93, and 22 Jun 93
Exhibit G. Letters, applicant, dated 29 Sep 91, 2 Oct 91, 15 Jan 92, and 29 Dec 92, w/atchs.

OSCAR A. GOLDFARB
Panel Chairman

RECORD OF PROCEEDINGS
AIR FORCE BOARD FOR CORRECTION OF MILITARY RECORDS

IN THE MATTER OF: DOCKET NUMBER: 91-01524

LARRY W. NEPTUNE COUNSEL: NONE

287-42-5056 HEARING DESIRED: YES

APPLICANT REQUESTS THAT:

1. His record reflect completion of Air Command and Staff College at the time of the Calendar Year (CY) 1985 Lieutenant Colonel, and he be promoted to the grade of lieutenant colonel as if selected by the Calendar Year (CY) 1985 Lieutenant Colonel Board.

2. Reinstatement to active duty, with full entitlement to the seven-day option, until the last day of the month following submission of his promotion for Senate confirmation.

APPLICANT CONTENDS THAT:

1. When his record was considered for promotion by the CY85 Lieutenant Colonel Board, his Air Command and Staff College (ACSC) entry should have shown as "completed."

2. Through no fault of his own, the earlier board schedule and miscommunication from the Extension Course Institute (ECI) precluded him from having an accurate record for consideration at the CY85 Lieutenant Colonel Board.

3. In accordance with 10 U.S.C., the latest date of rank (DOR) which could have been considered in the promotion zone (IPZ) by the CY85 Central Lieutenant Colonel Board

was 27 Oct 82; however, the DOR criterion for the CY85 Board was 30 Nov 82 or earlier. Therefore, using this DOR criterion, the earliest date that the CY85 board could have convened would have been 1 Dec 85.

4. Including those officers with DORS who should not have been considered, increased the overall quality of considerees and selectees which ultimately affected the "benchmark" records used by the Special Selection Board (SSB); thus, using those records to score SSBs cannot provide a fair basis for promotion reconsideration.

5. Air Force selection boards do not meet the statutory requirements of 10 U.S.C. with regard to the identification and certification of the list of selectees by the Board. Thus, these violations void his mandatory retirement because he has never been twice considered and nonselected for promotion by a legally conducted Air Force Selection Board.

6. He contends that each board that considered his records for promotion used a computer model called the "Projected order of Merit" (POM). This is a "secret system" known only to the board president and support staff. The "predictions" of this system are used by the board president to identify records for rescore by the same panel or a different panel. The board president uses this system without the knowledge of board members to review records which the computer has "predicted" would be "selected in" and which panel members "selected out" and vice versa. As a result, the board president plays a very influential part in determining selections and nonselections.

7. He worked hard to correct deficiencies in the officer promotion and evaluation systems, however his performance reports did not reflect this effort and these reports were not forwarded for higher level indorsement.

8. He contends that officers whose records are corrected to reflect "continuous active duty" by the AFBCMR are not treated the same as though they had been on continuous active duty. In this respect, he states that the 7-day option does not apply and these AFBCMR recalled officers get "fall out" assignments not accepted by those on active duty.

9. He contends that due to the egregious, systematic, and repetitive errors by the Air Force "blue suit" community, only the AFBCMR can effectively intercede and grant the requested relief.

In support of his appeal, applicant submits postcards he received from the ECI regarding his testing and other documentation.

Applicant's complete submission is attached at Exhibit A.

STATEMENT OF FACTS:

During the time period in question, applicant was serving on extended active duty, in the grade of major, assigned as the Chief, Appeals and Analysis Branch, Promotion Division, Air Force Military Personnel Center, Randolph AFB, Texas.

Applicant was considered and not selected for promotion to the grade of lieutenant colonel by the CY85, CY86, CY87, CY89, and CY90 Central Lieutenant Colonel Selection Boards. There was no selection board in CY88. Applicant's officer Selection Brief (OSB) indicates that he completed ACSC by correspondence in 1986.

OER/OPR profile since 1980, follows:

PERIOD ENDING	EVALUATION OF POTENTIA
10 MAR 81	1-1-1
31 JAN 82	1-1-1

15 DEC 82	1-1-1
24 MAY 83	1-1-1
24 MAY 84	1-1-1
* 12 APR 85	1-1-1
4 JAN 86	1-1-1
** 8 JUN 86	1-1-1
*** 8 JUN 87	1-1-1
8 JUN 88	1-1-1
**** 4 FEB 89	Meets Standards
***** 6 OCT 89	Meets Standards

*Top report at time of CY85 Lt Col Board
**Top report at time of CY86 Lt Col Board
***Top report at time of CY87 Lt Col Board
****Top report at time of CY89 Lt Col Board
*****Top report at time of CY90 Lt Col Board

Applicant was released from active duty on 30 Sep 90 and retired in the grade of major on 1 Oct 90. He served 20 years and 20 days of active duty.

AIR STAFF EVALUATION:

The Chief, Promotion Division (AFMPC/DPMAJ) reviewed this application and stated that technical advisories from the offices having primary responsibility for the areas under contention were obtained. In this respect, they state that applicant was first eligible to enroll in an ACSC program in Sep 76; however, he did not enroll in the correspondence program until 25 Jul 81. He was disenrolled on 28 Sep 83 because of failure to complete the course. Applicant reenrolled in the ACSC correspondence course on 20 May 85 and completed the course on 2 Jan 86, about two months after the CY85 board adjourned. They noted that although applicant stated that he had programmed his completion of ACSC to coincide with an expected board date of Nov/Dec

85, his completion date was well outside the time frame he expected the board to convene. They are not convinced that the earlier board schedule was the cause of his nonselection for promotion. Further, although applicant alleges that his "30C" completion card clearly states that two exams were sent to him, he misinterpreted the card. In fact, the card states that the "30C" exam and "30D" material were being forwarded. Also, applicant makes frequent reference to three different sections of 10 U.S.C., but it is unclear how these sections relate to his application; however, they would be amenable to commenting on them at a later date if he clarifies how they are each related to his appeal. Regarding the 7-day option, the technical advisory indicates that this not an option for officers who are directed to return to active duty; however, any requirement to return to active duty could be waived.

A complete copy of the evaluation, to include the technical advisories, is attached at Exhibit C.

APPLICANT'S REVIEW OF AIR STAFF EVALUATION:

Applicant reviewed the Air Staff evaluation and addresses his remarks for the Board to consider as follows:

ACSC ISSUE: The 2 Jan 86 completion course date is only the date that ECI scored the test. While it is true that he misinterpreted the information on the "30C" postcard, since he had already received the materials for the "30D" course, he assumed the tests were sent. Had the tests been provided as he believed, he would have completed them in time, mailed them by Express Mail, thus ensuring his records were updated in time for the CY85 board.

ELIGIBILITY FOR CONSIDERATION FOR PROMOTION: He indicates that there was an eligibility problem with the CY85 board and the Air Staff was aware of

the problem. In this respect, he states that in accordance with 10 U.S.C., the latest date of rank (DOR) which could have been considered in the promotion zone (IPZ) by the CY85 board was 27 Oct 82 - three years and one day before the board convening date of 28 Oct 85; however, the DOR criterion for the CY85 board was 30 Nov 92 or earlier. Therefore, the earliest the CY85 board could have convened using this DOR criterion was 1 Dec 85. As such, had the CY85 board legally convened, he would have completed the ACSC by the convening date.

Further, he believes the officers who were "illegally considered" affected the overall selection rate for those in-the-promotion-zone and above-the-promotion zone (IPZ/APZ) because the "illegally considered" officers were those majors who were selected for promotion below-the-promotion zone (BPZ) by the CY81 Central Major Board. This increase in quality increased the quality of records at the level of "cutoff" for the IPZ/APZ selection and effectively denied quotas to officers considered I/APZ. This increase in quality also affected the "benchmark" records used by the Air Force for Special Selection Boards (SSBs). In this respect, since Air Force benchmark records are supposedly consistent with the lowest score category selected and the highest score category not selected, any factor changing the level of quality at the promotion cut-off score flaws the basic tenant of Air Force benchmark records selection. The facts prove that the CY85 board was tainted.

RECOMMENDATIONS FOR PROMOTION BY SELECTION BOARDS AND REPORTS OF SELECTION BOARDS: He states that the aforementioned was not the only problem with statutory compliance associated with the CY85 Central Lieutenant Colonel Board. He states his objections to the way the Board certified the recommended list of selectees which he believes invalidates the entire board results, which in turn carries over to the SSBs. He

states that the Air Force promotion system is largely illegal. In fact, he pointed out in 1985 that there were problems with the General Officer selection procedures and the law. Further, he states that in his position, he worked to correct deficiencies in the officer promotion and evaluation systems, but his efforts were not recognized on his performance reports. Between 1983 and 1990, he was the only officer out of nine assigned to the Promotion Division who did not receive an AF/DP indorsement on his/her top OER prior to consideration for promotion to lieutenant colonel.

SEVEN DAY OPTION: Lastly, with regard to the 7-day option, he states that persons who are reinstated to active duty are not treated as if their record had been corrected to "Reflect Continuous Active Duty," which is inconsistent with the Board's intent to treat officers as if they had not had a break in service.

PROBABILITY OF SELECTION: As stated in his initial application and not disputed by the Air Staff is that his score was at the "cutoff" score - in fact his score was above at least 48 officers selected for promotion by other panels. Since the Air Staff did not dispute his ability to assess records, it is clear that no one on active duty today has the same depth of experience that he developed while at AFMPC; therefore, he states that the Board can accept his assertion (unchallenged by the Air Staff) that if ACSC had been in his file when it was considered by the CY85 board, he would have been selected for promotion.

WAIVER OF TIME LIMITATIONS: Further, should the Board decide to time bar his case, it should note that he was openly discouraged from filing an appeal by his supervisors and that these persons were involved in the preparation of the advisory.

Applicant's complete response is attached at Exhibit E.

ADDITIONAL AIR STAFF EVALUATION:

DPMAJ reviewed the applicant's rebuttal comments and stated that his arguments regarding ACSC are based on his supposition that it should be included in his record as it met the CY85 Lieutenant Colonel Board even though he failed to complete it before the board adjourned. Applicant had a total of eight years and one month in which to take ACSC by correspondence and since it was not finished until January 1986, it is impossible to say applicant would have finished it by 1 December 1985, the date he believed the board could have met. Relief should not be granted in a situation that was solely the result of his procrastination. Applicant's numerous other contentions are solely based on his interpretations of the law which they are not prepared to acknowledge. They believe applicant's interpretations are seriously flawed and as a consequence, relief based on such flawed interpretations would be inappropriate. Therefore, they again state that applicant's requests should be denied.

A complete copy of the evaluation, with attachments, is attached at Exhibit F.

The Deputy Chief, General Law Division (AF/JAG) reviewed this application and stated the basis for applicant's ACSC allegations is without merit and he should not be given constructive credit for completing ACSC prior to the CY85 promotion board. With regard to the legality of the CY85 Lieutenant Colonel Board, they state that the board did not consider officers with a DOR later than 1 Nov 82, so no officer was considered with less than the requisite time in grade. Therefore, they find no basis to recommend the relief requested.

A complete copy of the evaluation is attached at Exhibit G.

APPLICANT'S REVIEW OF ADDITIONAL AIR STAFF EVALUATION:

Applicant reviewed the additional Air Staff evaluations and states that for ease of review, he has divided the central issues of his petition into three areas: 1. the CY85 Lieutenant colonel Board was illegally convened in violation of statute (10 USC, Section 619); 2. the board procedures used by the CY85 board were contrary to statute (10 U.S.C., Sections 611, 616, and 617); and 3. the impact these violations of statute implementing directive(s) and regulation(s) had on his nonselection to the grade of lieutenant colonel by the CY85 and later selection boards. He requests the AFBCMR examine the evidence in his case because the evidence clearly and unequivocally proves his position(s) are sourced in statute(s), directive(s), regulation(s) and other implementing documents - a view clearly contrary to the Air Staff positions.

ILLEGALLY CONVENED CY85 LT COLONEL BOARD:
He states that the statute indicates that an officer who is on the active duty list of the Air Force, in the grade above first lieutenant, may not be considered for selection for promotion to the next higher grade until he has completed three years in the grade in which he holds a permanent appointment. The two Air staff advisories attempts to dismiss this statutory requirement as having no effect and in this effort, contradict themselves in their presentation of information regarding the statutory requirement. DPMAJ states that "... it is fair to state that any officer eligible for the board can be thought of as being "considered for selection" at all times between those two dates [28 Oct 85 to 8 Nov 85]." Therefore, by admission, AFMPC has stated that officers were considered at all times between the two dates. The conclusion is inescapable, AFMPC has admitted the illegal consideration at the CY85 Lieutenant Colonel Board.

AF/JAG takes a slightly different tact, they state that " ... the board did not consider officers with a DOR later than 1 Nov 82, so no officer was considered with less than the requisite time in grade." This position contradicts the statutory requirement which limits consideration to only those officers with three years or more time in grade, but also the AFMPC admission which states that "consideration" occurred beginning on 29 Oct 82. Neither advisory has referenced the "official Air Force position" on this subject as promulgated by AFR 36-89 which states that "... an officer is eligible if he or she meets the criteria approved by the Secretary of the Air Force. NOTE: officers in the grade of ... major must have completed 3 years' time in grade, counting from their DOR, to be eligible for consideration by the board in the promotion zone. He states that AFMPC cites a legal opinion which they imply relates to his petition. This opinion discusses Secretarial prerogative to waive the three year time in grade requirement for BPZ consideration. While 10 U.S.C., Section 619(a)(4) allows such a waiver, this portion of the statute does not allow waiver of the IPZ criterion. His issue deals with in promotion zone eligibility, not the BPZ eligibility alluded to by AFMPC. In summary, there is no provision in law which allows the Secretary to waive the DOR provisions for in promotion zone consideration. Although both advisories attempt to dismiss the impact of the illegal board convening date, the fact remains that a sizable number of line officers did not have the required time in grade when considered. AFR 36-89, Promotion of Active Duty Officers, dated 17 Apr 92, after the Senate Armed Services Committee (SASC) Report was published and after he retired, states that with regard to Board Scheduling, "...Boards for promotion to major, lieutenant colonel, and colonel shall be convened so that officers eligible in the promotion zone will have at least 3 years time in grade as of the convening date of the board."

CENTRAL SELECTION BOARDS IN VIOLATION OF STATUTE: Applicant states that this relates to board operations and what selection boards are to do in accordance with 10 U.S.C., Sections 616 and 617. Section 616 is clear: A selection board cannot recommend the officer for promotion unless the officer receives the recommendation of a majority of the members of the board, and the officer is found fully qualified for promotion by a majority of the members of the board. Such language clearly requires the board members to know the names of the officers they recommend for promotion. Equally clear is Section 617 which requires the officers recommended must be certified as "best qualified" for promotion. Such language again requires the board members to know the names of the officers they recommend for promotion. He argues that the "methodology" concept does not in fact provide the randomness of record review that AFMPC would have the Board believe. A review of the advisories indicates that fully 30% of the board members do not even see a line officer's record as competitive category board members participate in only 2 - 4 days of the 10 - 11 day board proceedings. Then these officers leave, however, they certify the results of the board! He provides tables and charts which he indicates represent the score and quota distribution of line officers by the CY85 board. He states that according to his charts, his score was 43.5 and 56 records with lower scores were selected and 49 officers with his score were also selected. He states that the caprice of the Air Force methodology is clearly shown by his charts.

He then discusses the POM which is a regression model which "predicts" by statistical analysis the order of merit of each record. The board president and the support staff are briefed regarding this model which is a secret system because the board members are not briefed about the model or its role in the selection process. These "predictions" are used by the board president to identify records for rescoring.

As a result, the board president plays a very influential part in determining selection and nonselection. The board president can move records between or among panels and such panel reassignment does not adjust the panel quota. This demonstrates that each panel is in fact a mini board - an autonomous board unto itself, which is only subject to the purview of the board as a whole by the board president acting through a process which has been described by the SASC as a process which was arbitrary and capricious. In summary, the evidence indicates that neither the board actions nor the certification required by law that the officers recommended by the board were "best qualified" was accomplished.

BPZ OFFSET: Applicant also discusses the problem regarding the issue of the "illegal" considerees using quotas to which they were not entitled and the board illegally allocating quotas to officers who were below the zone eligibles (by law and regulation) without the knowledge and concurrence of the board members. Applicant believes that the addition of those "illegal eligibles" to the CY85 lieutenant colonel board had a clearly prejudicial and negative effect on those considered for promotion in and above the promotion zone; and since promotions granted by illegal boards cannot be taken away, then only the AFBCMR can intervene and grant him a promotion. The data proves that he would have had at least an 80% probability of selection had the board been legally convened.

COMPLETION OF ACSC: He also states that he would have completed ACSC within the time parameters had the miscommunication not occurred and "express conveyances" been used.

SSBs: He reiterates his position regarding SSB consideration and that an SSB cannot resolved his select status. In this respect, he states that as a result of the illegally convened,

illegally conducted board(s), the benchmark records were not truly representative of the quality of the records at the "cutoff" point for the board(s), and secondly, the scoring system was arbitrary and capricious as the "benchmark records" did not reflect the "bottom scoring selectees and top scoring nonselectees."

DIRECT PROMOTION: He states that the only way to resolve the issue is for the AFBCMR to give him a direct promotion.

OTHER AREAS: He states that the most compelling proof of the relevancy, applicability and appropriateness of the topics he surfaced in 1983, 1984 and 1985 (and through 1990) is found in the new AFR 36-89, dated 17 Apr 92. The new regulation answers the eligibility by DOR question, the question of separate boards for competitive categories, the board president's role, the question of findings and certification. While AFMPC has stated that many of his positions were not accepted, clearly, most of these arguments have been accepted and incorporated in the new regulation.

OER QUOTA SYSTEM: He discusses this system and the level of indorsements on performance reports he received. The analysis he completed after his CY85 nonselection was completed to show "how to operate within the three star quota system." AFMPC was careful not to release documents which confirmed this illegal quota system, however, it was common knowledge that such a system was in effect prior to the officer Evaluation System (OES). AFMPC does not detail what procedures were employed to determine which records would be elevated to receive AF/DP indorsements.

APPEAL ON EAD: He discusses appealing his case while he was still on active duty and states that he was advised that an application would be a "conflict of interest."

7 DAY OPTION: He states that if his appeal is granted, he should be given the opportunity of the 7-day option.

Applicant's complete 24 page response, with 23 attachments, is attached at Exhibit I.

ADDITIONAL AIR STAFF EVALUATION:

DPMAJ again reviewed applicant's response and stated that applicant's stating of facts is clearly suspect. They cannot accept any of his statistics concerning board scores as authentic, likewise, they do not accept his arguments based on them. Also, they do not accept his personal legal interpretations and in key areas of disagreement, they have relied on the review and analysis of qualified legal counsel. They maintain their initial recommendation that his case should be denied because he has failed to provide evidence of a material error or injustice.

In particular, they state that applicant misses the point of their argument on the issue of officers being considered for selection at all times between 29 Oct and 8 Nov. The point is that no one can say with any certainty whether the board initially scored an individual's record either before or after 1 Nov - only chance dictated whether or not the scoring occurred before or after that date. They do not dispute the fact that scoring started on 29 Oct. It is also true that boards have since been scheduled to ensure that this type of situation is not repeated. The original schedule was never changed because it was determined that since each officer was guaranteed the opportunity to be considered after he/she completed three years, all legal requirements were met and all the affected officers were treated fairly. Contrary to what applicant would like to assume, a careful review of the entire board file revealed that not a single officer, in any competitive category, had a DOR later than 1 Nov 82.

The IPZ eligibility criteria was set to ensure all the officers who were selected BPZ by the CY81 Central Major Board were again considered IPZ for lieutenant colonel by the CY85 central board. This decision was made not to disadvantage any portion of those officers selected by the CY81 Major Board. Rather, it was made to be fair to all affected officers, including those who pinned on as of 1 NOV 82. Had this group been excluded, they would have had to wait an additional year for consideration. Board scheduling constraints made a later convening date difficult. Therefore, after all things were considered, the Air Staff decided to convene the board on 28 Oct.

Contrary to applicant's allegation, they see no reason to speculate that board members left before 1 Nov.

Although he assumes that Air Force selection boards operate in violation of several provisions of 10 USC, they state that applicant's claims are based entirely on his personal opinion and questionable legal interpretations. In this respect, there is no provision in law which specifically requires each board member to personally review and score each officer's record being considered by the board.

He also claims that the "lieutenant colonel board that considered my record for promotion" violated the provisions of Department of Defense (DOD) Directive 1320.09 dated 18 Sep 81, that states: "Separate selection boards shall be convened for each competitive category and grade..." because separate panels, not separate boards, considered officers in different competitive categories. Yet in paragraph 3(c), he states "This statement confirms my position panels are really separate boards ..." It would appear the applicant chooses to interpret the US Codes and DOD directives in a manner to suit his own purposes, instead, of in an objective, consistent manner. Further, while applicant argues that records are not distributed in random order, they state this is

an unproven assumption and interpretation of convenience. Even if accurate, it would not constitute a violation because statutes and regulations guarantee an individual will not be considered by the same board member in two consecutive years; however, there is no prohibition against previously nonselected officers competing with a similar group of previously nonselected officers.

They do not accept his table of numbers as authentic. All official records of board scores are destroyed after a selection board is approved, unless some other action stays the destruction. No action stayed the destruction of the official scores from the CY85 Central Lieutenant Colonel Board. They do not know how the applicant obtained or generated the figures he uses; since no official record exists, they are unable to accept his figures as accurate or factual. While the official scores may not have been destroyed immediately after the board was released, they were destroyed shortly after. They can say that the scores available to "agencies not members of the board" were not in a form that could associate a score with a person. In applicant's duty position at the time the board was conducted, his access would have been limited to the board support data file, a file which did not include names and their associated scores. If he somehow gained access to this data, it is possible he obtained copies of it. If so, his use of such data in this fashion is highly questionable. This type of data, in their opinion, can only be used for unofficial private purposes if it is obtained through Freedom of Information Act or Privacy Act requests. They can state, with 100% certainty, this data was not obtained in this fashion. Therefore, since this data no longer exists, they can neither confirm its accuracy or authenticity nor accept it as proof of any of his allegations. It is a fact that cutoff scores will vary among panels, but what is important is that the quality of the record at the cutoff point is not significantly different between two panels. Years of experience demonstrate that it

is not. The computer generated printout purporting to show his board scores was examined by board room personnel familiar with all board procedures during the time period in question and it was not a format used by anyone in 1985. While they cannot say for certain what his scores were, it is their expert opinion that is it unlikely that the printout accurately reflected the record quality at the point on the order of merit at which his record probably fell. They cannot accept the accuracy of this "proof" and reject any arguments arising from its use.

Calling the POM system a secret system is not accurate; the board members were told it was a management tool to assist the board president in his responsibility for quality review. The POM was a computer-based statistical analysis that predicted, on the basis of past boards, how any given individual might be scored on the current board. If, in the board president's opinion, any record identified appeared out of place, quality-wise, in comparison to other similarly scored records, he could send it to another panel for revote. In response to applicant's assertion that the board president "plays a very influential role" in the selection process, they state that all the board president is doing is exercising his responsibility to ensure the scoring of records is accomplished equitably. Again, the figures applicant provided were shown to the board secretariat and were found to be confusing and unrepresentative of the actual process. Panel quotas are not computed until all the scoring is completed. Thus, his assertion that records are moved among panels without a corresponding quota adjustment is wrong.

His discussion regarding "near-splits" is misleading. Records which end up in the "grey zone" may be rescored several times until they fall out one way or the other. Thus, it can't be said they are selected out without a majority vote.

His discussion of the BPZ selection process is not accurate. After the BPZ order of merit is finalized and the last possible select is identified, that record is compared against the #1 I/APZ nonselect on every panel by every panel member. Every member of the board at large has the opportunity to review the BPZ displacement. The total BPZ quota is used only if the majority members of the board agree the lowest BPZ select is of a higher quality than their #1 I/APZ nonselect. All board members from every panel are given the chance to review BPZ selects. His argument is based on faulty reasoning or erroneous assumptions and interpretations on his part.

He applies similar reasoning to show that Air Force selection boards are in violation of regulations. They state they have already sufficiently addressed each item.

They discuss his statistical comparison rates using the "illegally" considered officers and dispel his arguments by stating that these officers were not illegally considered.

With regard to the ACSC issue, they reiterate that it was the applicant's choice to complete the course when he did. He waited over eight years to complete ACSC, the Air Force should not bear the burden of his procrastination. Interestingly, applicant accuses ECI of a "secret policy" governing treatment of some students. He does not clarify exactly what the "secret policy" was or how it affected him.

They state the have sufficiently addressed all the premises upon which his arguments regarding why he cannot be fairly considered by SSB are based.

In response to his arguments regarding an illegal OER "indorsement level" quota system, they state he provides no new information. They state that AFR 36-10 had prohibitions against forced distributions of any OER "rating." "Ratings"

can only be considered as the numerical marks on either Section III or section V of the old OER form. As the term "rating" only applies to these sections, and the only regulatory prohibition against a "forced distribution" or "quota" applied to those sections, they fail to understand how there could have been an "illegal quota system" operating with respect to indorsement levels. Top indorsements recognized top performers in all aspects of the whole person concept -- from duty performance through professional military and civilian education. Applicant has not addressed what role his duty performance, bearing, or behavior may have played in his final indorsement; or how his lack of either advanced civilian education or appropriate Professional military Education (PME) may have affected it. In summary, they conclude that in the view of his evaluators at the time the OERs were rendered, his performance consistently did not merit higher indorsement.

They have no further comment regarding the 7-day option. In conclusion, they state that applicant rests much of his case on the Board accepting at face value his assertions, presumably because of his previous experience and expertise. However, there are too many areas in which his explanations of procedures, statement of "fact," legal or regulatory interpretations or assumptions are wrong, or questionable at best. Applicant's track record of stating what is fact is clearly suspect. They cannot accept his statistics concerning board scores as authentic, likewise, they cannot accept any arguments based on these scores. They do not agree with his legal interpretations; in areas of key disagreement, they have relied upon the review and analysis of qualified legal counsel. In short, they maintain their initial recommendation that applicant's case should be denied on the basis that he has failed to present evidence of a material error or injustice.

A complete copy of the evaluation is attached at Exhibit J.

APPLICANT'S REVIEW OF ADDITIONAL AIR STAFF EVALUATION:

Applicant reviewed the additional evaluation and furnished an 18 page response, with attachments, which reiterates his position that the CY85 Lieutenant Colonel Board was illegally convened in violation of statute; the board procedures used by the CY85 board were contrary to statute; and lastly, these violations impacted on his nonselection for promotion to the grade of lieutenant colonel. Thus, he requests that he receive a direct promotion, or in the alternative, his nonselections be set aside and he be restored to his position, rank, and pay until he is terminated from active duty under proper authority.

In particular, applicant states that the Air Force is required to follow pertinent statutes, pertinent DOD Directives, and its own regulations; also, at issue is the interpretation of these standards. As stated in his petition and rebuttal, the "plain language" standard has long been the basis upon which compliance with statute, directive and regulation should be determined. His application detailed how the promotion boards that considered his record did not follow the "plain language" of the statute, directive or regulation.

With regard to the "illegally" convened CY85 board, he states the plain language is clear, "an officer may not be considered for selection for promotion until he has completed ...three years in the grade." The plain language of the statute was ignored - the statute was violated. The Air Staff has admitted regulatory violation, the potential for subsequent violation has been eliminated through AFR 36-89 revision, but AFMPC is now quibbling that their initial statutory violation "didn't matter." Also, he refutes the AFMPC's position regarding why the board could not have convened at a slightly later date. There is no statutory

requirement to consider officers together - but there is a statutory requirement to not consider unless they have three years time in grade. Although AFMPC accuses him of speculation regarding when competitive board members leave, he states that the previous DPMAJ position was that some board members do leave early, i.e. the JAG panel. Clearly, the AFMPC position is to deny the AFBCMR any information which would allow him or the Board to show he would have been promoted but for Air Force error.

With regard to the admissibility of evidence, he summarizes that the evidence is clear: the data he presented was indeed from the CY85 Lieutenant Colonel Board, the data portray score distribution among line officer considerees, and the data also portrayed "his score" as "at the cut off." The evidence is also clear AFMPC deliberately, systematically maintained data in direct violation of their own regulation.

With regard to "illegally" conducted central selection boards, 10 U.S.C., Section 616, he states that 30% of the board members left Randolph AFB before it would have been physically possible to have determined if he was recommended or not recommended by the selection boards or if the BPZ "offset" should have been used. Board members never knew the officers they were recommending for promotion (from the board as a whole or their panel).

With regard to the 10 U.S.C., Section 617, certification requirement, he states that almost one-third of the board members left town before it would have been physically possible to have determined if these results were certified by a majority of the board as recommended or not recommended by the selection board. What was the majority when a third of the selection board had no access to the recommendation or certification process that reviewed his record? The plain language of the statute was ignored. Selection board members never saw a list of the officers

certified as recommended for promotion. The certification list was not developed until after the board members left town. He refutes the AFMPC position regarding the fact that board members were in a position to participate in the overall process. For instance, a review of the briefing charts from the lieutenant colonel boards which considered his record for promotion, show they are virtually the same, however there is no comment on the use of POM in the board process. He spoke to a former board member who indicated that he knew nothing of the POM and its role in the selection process. The AFMPC position is false - period. AFMPC provides no documentation to support their position and perhaps, more importantly, no approval documents from SAF indicating his knowledge of such a system or his approval thereof. He refutes AFMPC's position regarding the randomness issue. They first stated that records are usually scored only in random order; however, now they state "random distribution of quality at each panel, but there is no proof of this distribution. He states that the assumption of the AF/JAG opinion is "the range of scores is basically identical. AFMPC does not refute his evidence. They state that the cutoff score will vary among panels but dismisses this as unimportant although they choose to rely on AF/JAG's position which states that scores are basically identical. The evidence shows a 3.5 point variance or almost 20% variance. This is an obvious non sequitur: the legal opinion is based upon basically identical scores, AFMPC now says, scores don't matter. Most important, no information is provided as evidence to support their claim.

There is no evidence to dispute the myriad secret systems which permeated the board process throughout the time he was on active duty. The Air Force changed their approach in 1992 to eliminate the foibles built into their system and he believes the Board needs to note from the 1983 and later briefings, appended to his 14 Sep 92 rebuttal, that virtually every change made to the new AFR 36-89 does not refute the

simple fact his input was provided in the early 80s, nor does AFMPC refute these same inputs became the basis for significant promotion regulation changes in 1992, some two years after he retired.

In regard to the issue of selection boards being in violation of DOD directives, he states that at least two DOD Directives (DODD 1320.09, effective 18 Sep 81 and 1320.12) establishing specific selection board procedures were ignored in the Air Force selection process and the Air Staff does not dispute these violations but rather AFMPC attempts to dismiss this area by a broad disclaimer. DODD 1320.09 requires separate boards for competitive categories. The Air Force major board(s) that considered his record for promotion clearly show(s) this directive was ignored as separate boards for each competitive category were not held. Although the Air Force must follow these directives, this DODD was violated. AFMPC tries to deflect away their violation, the Air Force does not dispute his claim that the directive was violated. DODD 1320.12 was also ignored, the impact is particularly apparent in the post 1987 selection boards although the same statutory restrictions were imposed in previous versions. SASC decried the Air Force failure to implement the 1987 directive, particularly regarding the role of the board president to adversely influence the selection process. These changes were not made until 1992 - some five years after issuance of the DODD. The AFMPC dismissed this issue as relating to only general officer promotions, however, no evidence is provided to refute his assertions that the board president's role was indeed much greater than authorized by DOD authority. He had no reason to question the "presumption of regularity" of Air Force officials until he reviewed the SASC submission. These violations clearly justify removal of his promotion nonselections.

With regard to violation of Air Force regulations, he states that the basic requirement granted each eligible officer "fair

and equitable consideration for promotion" was clearly not had. In his case, the board operated illegally. The evidence shows that neither the board actions nor the certification required by the implementing regulation were met by the boards that considered him for promotion.

With regard to the issue that SSBs cannot resolve his select status, he states that his evidence substantiates that SSB scoring criteria require a higher standard than would have been apparent at the original board and AFMPC provides no information to refute this assertion.

With regard to the ACSC issue, he reiterates that had the CY85 board convened as required by statute, he would have completed ACSC in time to have it posted in his record.

Now having proved that the selection board process is contrary to regulation, directive and statute, he states the remedy becomes important. Case law and prior AFBCMR experience provide a clear standard for corrective action. The errors in question are procedural and the errors and the procedures were instituted to provide him substantive protection, i.e., a process in which the majority recommended and certified officers for promotion. This right was clearly not had. Application to military personnel situations is shown in many cases. For example in Doyle v. U.S., the issue was illegally composed boards by the Army. The case states: "An Army officer cannot be terminated under the two pass over rule unless he has had two fair chances at promotion, as required by statute and regulation; this includes consideration by selection boards which are constituted squarely in accordance with statute and regulation ... Since ... officer's separations ... were invalid, such officers were entitled to their position, rank, and pay until they were terminated from active duty under proper authority, i.e. pursuant to recommendation of properly composed... selection boards." (emphasis added) Thus, he

requests the AFBCMR to set aside his promotion nonselections and restore him to the position, rank, and pay until he is terminated from active duty under proper authority.

Lastly, with respect to the direct promotion issue, he states that AFMPC's position centers exclusively on the presumption that his arguments are not based on fact. The Air Force position is centered on the "but for" test which has long been held as inappropriate in the forum established by 10 U.S.C., Section 1552. To overcome the "but for" standard clearly requires the Air Force to introduce substantial proof that he would not have been selected for promotion; the Air Force position presents no such data. The evidence clearly shows error by the Air Force in central boards which considered his file for promotion and the inability to recreate the process through SSB operating under current guidelines. AFMPC has been given repeated and extended opportunity to rebut this position, but provides no evidence to the contrary. Also, the advisories, regardless of the recommendation, do not provide instructions on specific action to be taken if the Board grants the application, as required by AFR 31-3. Clearly, the facts are not disputed with evidence: Specific corrective action is indeed within the purview of the Board; no evidence has been presented which would support the AFMPC recommendation that the Board cannot correct his record to promotion; and without evidence to the contrary, it is clear such promotion should be granted. At a minimum, the passovers should be set aside.

Applicant's complete response, with attachments, is attached at Exhibit L.

FINDINGS AND CONCLUSIONS OF THE BOARD

1. The application was not filed within three years after the alleged error or injustice was discovered, or reasonably could

have been discovered, as required by Section 1552, Title 10, United States Code (10 USC 1552), and Air Force Regulation 31-3. Thus the application is untimely.

2. Paragraph b of 10 USC 1552 permits us, in our discretion, to excuse untimely filing in the interest of justice. We have carefully reviewed applicant's submission and the entire record, and we do not find a sufficient basis to excuse the untimely filing of this application. The applicant has not shown a plausible reason for delay in filing, and we are not persuaded that the record raises issues of error or injustice which require resolution on the merits at this time. Accordingly, we conclude that it would not be in the interest of justice to excuse the untimely filing of the application.

3. The applicant's case is adequately documented and it has not been shown that a personal appearance with or without counsel will materially add to our understanding of the issue(s) involved. Therefore, the request for a hearing is not favorably considered.

DECISION OF THE BOARD:

The application was not timely filed and it would not be in the interest of justice to waive the untimeliness. It is the decision of the Board, therefore, to reject the application as untimely.

The following members of the Board considered this application in Executive Session on 12 August 1993, under the provisions of AFR 31-3:

Mr. G. Hammond Myers III, Panel Chairman
Mr. Thomas S. Markiewicz, Member
Mr. John L. Robuck, Member

The following documentary evidence was considered:

Exhibit A. DD Form 149, dated 30 Nov 90, w/atchs.
Exhibit B. Applicant's Master Personnel Records.
Exhibit C. Letter, AFMPC/DPMAJ, dated 6 May 91, w/atchs.
Exhibit D. Letter, AFBCMR, dated 18 Jun 91.
Exhibit E. Applicant's response, dated 17 Jul 91.
Exhibit F. Letter, AFMPC/DPMAJ, dated 21 Jan 92.
Exhibit G. Letter, AF/JAG, dated 9 Jul 92.
Exhibit H. Letter, AFBCMR, dated 16 Jul 92.
Exhibit I. Applicant's response, dated 14 Sep 92.
Exhibit J. Letter, AFMPC/DPMAJA, dated 3 Mar 93.
Exhibit K. Letter, AFBCMR, dated 11 Mar 93.
Exhibit L. Applicant's response, dated 11 May 93.

G. Hammond Myers III
Panel Chairman

RECORD OF PROCEEDINGS
AIR FORCE BOARD FOR CORRECTION OF MILITARY RECORDS

IN THE MATTER OF:	DOCKET NUMBER: 94-10323
WILLIAM R. HOOGSTRA.	COUNSEL:Controlled Equity, Inc.
366-50-0807	HEARING DESIRED: Yes

APPLICANT REQUESTS THAT:

1. Set aside all nonselections to the grade of lieutenant colonel.

2. His record be corrected to reflect continuous active service as a major from the date he was separated as a result of his nonselection to the grade of lieutenant colonel.

3. His record be corrected to reflect retirement in the grade of major the first day of the month after the decision of his application is announced.

4. He receive any and all back pay, allowances, and entitlements, to include retirement pay and allowances, associated with continuous active service until retirement in the grade of major.

APPLICANT CONTENDS THAT:

The inequities and regulatory violations of the controlled officer Effectiveness Report (OER) system in effect from 1975 until 1978 precluded him from receiving the "fair and equitable" consideration guaranteed by statute, directive, and

implementing directive. Secondly, the selection boards themselves were held in direct violation of statute, directive, and implementing regulation. As a result, he was not selected for promotion and was involuntarily separated from extended active duty.

In support of the appeal, counsel submits an 11 page brief with 6 attachments.

Applicant's complete submission is attached at Exhibit A.

STATEMENT OF FACTS :

Applicant was commissioned a second lieutenant and entered extended active duty an 23 January 1970. He was promoted to the grade of permanent major effective 1 January 1982

Applicant was considered and not selected for promotion to the grade of lieutenant colonel by the Calendar Year 1985 (CY85), CY86, CY87, and CY89 Central Lieutenant Colonel Selection Boards

OER/OPR profile since 1975 follows:

PERIOD ENDING	EVALUATION OF POTENTIAL
1 Sep 75	1-1-1
7 Jan 76	Abbreviated Report
15 Jul 76	3-3-1
31 Oct 77	3-3-3
31 Oct 78	1-1-1
11 Jun 79	1-1-1
11 Jun 80	1-1-1
11 Jun 81	1-1-1
23 Feb 82	1-1-1
31 Aug 82	1-1-1

31 Aug 83	1-1-1
28 May 84	1-1-1
28 May 85	1-x-1
28 May 86	1-1-1
15 Dec 86	1-x-1
30 Aug 87	1-x-1
19 Jun 88	1-1-1
4 Feb 89	Meets Standards

On 1 November 1989, applicant was retired from active duty in the grade of major.

AIR STAFF EVALUATION:

The Chief, Officer Evaluation Branch, AFMPC/DPMAEP, reviewed the application and states that they find the information provided does not substantiate unfair treatment by the controlled OER system for applicant. Counsel provides no factual support with respect to applicant's history and case circumstances. They state that it is reasonable to expect that more senior, experienced, and mature of officers in competition with less experienced contemporaries would receive a higher percentage of top block ratings. Further, applicant met selection boards as a part of cohort groups; therefore, if, as alleged, attachment 5 shows that an increased percentage of promotion-eligible officers received "top block" ratings on OERs over time, such would have little or no effect an applicant's selection or nonselection for promotion since all cohorts were similarly treated. A review of the documents provided does no reveal any violation of regulatory provisions or indicate that any OER(s) is/are flawed. Therefore, they recommend denial of applicant's request.

A complete copy of the evaluation is attached at Exhibit C.

The Chief, Selection Board Secretariat, AFMPC/DPMAB, reviewed the application and recommends denial. They state than counsel has not substantiated his allegations that the promotion boards in question were illegal or unfair. Although counsel challenges the panel concept used by the Air Force and the certification requirements of the board results, the Air Force has used the panel concept for many years in conducting selection boards and the procedure was reviewed as late as February 1992. The panel concept has safeguards to insure an equal distribution of the quality spectrum of records to each panel. As each panel scores its records, an order of merit (OOM) is formed. It is the board president's responsibility to review the OOMs to insure consistency of scoring on each panel and consistency of quality among the panels. Without exception, the quality of records always has been identical at the same percentage level on each OOM. While it is true that the board members do not see a complete select list, under the panel concept one panel does not have know what the other panels have done. The panel's tank is to align their records in an OOM and break ties when the quota runs out at a score category that has more records in it than the quota allows to be promoted, commonly known as the "gray zone." In resolving gray zone ties, the panel understands that all records scoring higher than the lowest select on its OOM are also selects. Also, counsel is incorrect on two issues: (1) the Air Force continues to conduct selection boards today as there were conducted previously in that boards are still convened concurrently and board reports are consolidated as authorized; (2) after the below-the- promotion zone (BPZ) OOM was finalized and the last possible select was identified, that record was compared against the number one in/above-the-promotion zone (I/APZ) nonselect on every panel scoring that competitive category by every panel member. Every board member scoring the competitive category had the opportunity to review the BPZ

displacement. The total BPZ quota was used only if the majority of the board members agreed the lowest scoring BPZ select was of a higher quality than the number one I/APZ nonselect. Counsel's allegation regarding the illegality of special selection boards (SSBs) is without merit.

A complete copy of the evaluation is attached at Exhibit D.

The Chief, Promotion Division, AFMPC/DPMAJ, reviewed the application and states that the advisory opinions from DPMAEP and DPMAB address applicant's allegations and supporting documentation. They recommend denial on the basis of timeliness; if considered, deny due to lack of merit.

A complete copy of the evaluation is attached at Exhibit E.

The Chief, Retirement Program Section AFMPC/ DPMARR1, reviewed the application and states that it appears there were no injustices or irregularities that occurred with applicant's nonselection for promotion or subsequent discharge. Therefore, they recommend denial.

A complete copy of the evaluation is attached at Exhibit F.

The Staff Judge Advocate, AFMPC/JA, reviewed the application and recommends denial on the basis of timeliness. They state applicant has failed to file within the allotted time period and has not satisfactorily explained this failure. It would not be in the interest of justice to excuse the failure. It is also their opinion that applicant, on the merits, has failed to present relevant evidence of any, error or injustice warranting relief.

A complete copy of the evaluation in attached at Exhibit G.

APPLICANT'S EVALUATION OF AIR STAFF EVALUATION:

Counsel reviewed the Air Staff evaluations and reiterates his position that not only was the controlled OER system inequitable and illegal, the Air Force has fraudulently concealed this from applicant, Congress, the courts, the AFBCMR, and selection boards, and applicant was a victim of a systematically inequitable and illegal evaluation system. Applicant was intentionally uninformed and misinformed concerning the fairness and equity of the controlled system/selection boards. He submits a letter from a retired USAF lieutenant colonel who was a personnel officer during the contested time period indicating that the appeal is timely based on the fact that he notified applicant in April 1993 that his legal entitlement to fair and equitable promotion consideration had been violated. He stated further that had he not been directed to remain silent regarding what he knew about the controlled OERs, the applicant would have been informed of his cause for action in 1980. Counsel states that promotability is not the issue before the AFBCMR, rather it is the removals of the nonselections for promotion and the retirement/separation resulting from the process that violated applicant's legal and regulatory entitlement to fair and equitable promotion consideration.

In support of applicant's request, Counsel submits an eight page rebuttal with five attachments.

Counsel's complete response is attached at Exhibit I.

FINDINGS AND CONCLUSIONS OF THE BOARD:

1. The application was not filed within three years after the alleged error or injustice was discovered, or reasonably could have been discovered, as required by Section 1552, Title 10, United States Code (10 USC 1552), and Air Force Regulation 31-3. Although the applicant asserts a date of discovery which would, if correct, make the application

timely, the essential facts which gave rise to the application were known to applicant long before the asserted date of discovery. Knowledge of those facts constituted the date of discovery and the beginning of the three-year period for filing. Thus the application is untimely.

2. Paragraph b of 10 USC 1552 permits us, in our discretion to excuse untimely filing in the interest of justice. We have carefully reviewed applicant's submission and the entire record and we do not find a sufficient basis to excuse the untimely filing of this application. The applicant has not shown a plausible reason for delay in filing, and we are not persuaded that the record raises issues of error or injustice which require resolution on the merits at this time. Accordingly, we conclude that it would not be in the interest of justice to excuse the untimely filing of the application.

3. The applicant's case is adequately documented and it has not been shown that a personal appearance with or without counsel will materially add to our understanding of the issue(s) involved. Therefore, the request for a hearing is not favorably considered.

DECISION OF THE BOARD:

The application was not timely filed and it would not be. in the of justice to waive the untimeliness. It is the decision of the Board, therefore, to reject the application as untimely

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The following members of the Board considered this application in Executive Session on 19 January 1995 under Provisions of AFR 31-3:

Mr. Walter A. Willson, Panel Chairman
Ms. Karen Bingo, member
Ms. Martha Maust, Member

The following documentary evidence was considered:

Exhibit A. DD Form 149, dated 13 May 93, w/atchs.
Exhibit B. Applicant's Master Personnel Records.
Exhibit C. Letter, AFMPC/DPMAEP, dated 9 Sep 93,
Exhibit D. Letter, AFMPC/DPMAB, dated 8 Nov 93, w/atchs.
Exhibit E. Letter, AFMPC/DPMAJ, dated 20 Jan 94.
Exhibit F. Letter, AFMPC/DPMARR1, dated 8 Jun 94.
Exhibit G. Letter, AFMPC/JA, dated I 3 Jul 94.
Exhibit H. Letter, AFBCMR, dated 14 Jul 94.
Exhibit I. Counsel's response, undated with attachments.

WALTER A. WILLSON
Panel Chairman

RECORD OF PROCEEDINGS
AIR FORCE BOARD FOR CORRECTION OF MILITARY RECORDS

IN THE MATTER OF: DOCKET NUMBER: 94-03730

ALICE D. LORENZEN COUNSEL: Controlled Equity

500-48-9455 HEARING DESIRED: Yes

APPLICANT REQUESTS THAT:

1. Set aside all nonselections to the grade of lieutenant colonel.

2. Her record be corrected to reflect continuous active service from the date she was separated as a result of her nonselection for promotion to the grade of lieutenant colonel.

3. Her record be corrected to reflect retirement in the grade of major the first day of the month after the decision of her application is announced.

d. She receive back active duty pay and allowances, back retirement pay and allowances, and grant all other pays and/or entitlements associated with continuous active service until retirement as a major.

APPLICANT CONTENDS THAT:

The inequities and regulatory violations of the controlled Officer Effectiveness Report (OER) system in effect from 1974 until 1978 precluded her from receiving the "fair and equitable" consideration guaranteed by statute, directive, and implementing directive. Secondly, the selection boards

themselves were held in direct violation of statute, directive, and implementing regulation. As a result, she was not selected for promotion and was involuntarily separated from extended active duty. Additionally, since the Air Force chose to deliberately deceive her about the controlled OERs and the impact of these OERs on the promotion system, compensation which was designed to offset her expenses incurred while in transition to civilian life should not be recouped. Her separation was clearly illegal, and remission of her debt would be just compensation for the deliberate injustice incurred through no fault of her own.

In support of the appeal, counsel submits an 11 page brief.

Applicant's complete submission is attached at Exhibit A.

STATEMENT OF FACTS

Applicant was commissioned a second lieutenant on 23 January 1970 and entered extended active duty. She was promoted to the grade of permanent major effective 1 January 3, 1983. Applicant was considered and not selected for promotion to the grade of lieutenant colonel by the Calendar Years 1985, 1986, 1987, and 1989 (CY85/86/87/89) Central Lieutenant Colonel Selection Boards. There was no board in 1988.

OER/OPR Profile since 1973 follows:

PERIOD ENDING	EVALUATION OF POTENTIAL
31 MAR 73	9-3
30 DEC 73	9-4
30 JUN 74	9-4
30 JUN 75	9-3
1 JAN 76	Abbreviated Report
31 OCT 76	1-2-3
1 JUL 77	1-2-3

10 OCT 78	1-1-1
31 JUL 79	1-1-1
8 APR 80	1-1-1
8 APR 81	1-1-1
14 DEC 81	1-1-1
31 JUL 82	1-1-3
11 MAY 83	1-1-1
11 MAY 84	1-1-1
11 MAY 85	1-1-1
10 MAR 86	1-1-1
30 MAR 87	1-x-1
5 NOV 87	1-x-1
5 NOV 88	Meets Standards

On 31 October 1989, applicant was released from active duty and retired effective 1 November 1989, in the grade of major. She served 20 years and 8 days of active duty.

AIR STAFF EVALUATION:

The Chief Selection Board Secretariat, AFMPC/DPMAB, reviewed the application and recommends denial. They state that counsel has not substantiated his allegations that the promotion boards in question were illegal or unfair. Although counsel challenges the panel concept used by the Air Force and the certification requirements of the board results, the Air Force has used the concept for many years in conducting selection boards and the procedure was reviewed as late as February 1992. The panel concept has safeguards to insure an equal distribution of the quality spectrum of records to each panel. As each panel scores its records, an order of merit (OOM) is formed. It is the board president's responsibility to review the OOMs to insure consistency of scoring on each panel and consistency of quality among the panels. Without exception, the quality of records always has been identical at the same percentage level on each OOM. While it is true that the board members do not see a complete

select list, under the panel concept one panel does not have to know what the other panels have done. The panel's task is to align their records in an OOM and break ties when the quota runs out at a score category that has more records in it than the quota allows to be promoted, commonly known as the "gray zone." In resolving gray zone ties, the panel understands that all records scoring higher than the lowest select on its OOM are also selects. Also, counsel is incorrect on two issues: (1) after the below-the-promotion zone (BPZ) OOM was finalized and the last possible select was identified, that record was compared against the number one in/above-the- promotion zone (I/APZ) nonselect on every panel scoring that competitive category by every panel member. Every board member scoring the competitive category had the opportunity to review the BPZ displacement. The total BPZ quota was used only if the majority of the board members agreed the lowest scoring BPZ select was of a higher quality than the number one I/APZ nonselect; and (2) the Air Force continues to conduct selection boards today as they were conducted previously in that boards are still convened concurrently and board reports are consolidated as authorized. With regard to counsel's challenge of the procedure for board certification, they state that the procedure was reviewed in February 1992 by HQ USAF/JAG and found to be in compliance with applicable statutes. Although counsel quoted from the Department of Defense Directive (DODD) 1320.9 regarding the convening of separate selection boards, he fails to quote the other portions of the directive which indicates that selection boards convened for different competitive categories or grades may be convened concurrently when practicable and the written reports under 10 United States Code (U.S.C.) 617 may be consolidated into a single package for submission as prescribed under 10 U.S.C. 618. Additionally, while he cites a Senate Armed Service Committee (SASC) report concerning the Selection Board scoring process, he conveniently leaves out that the Office of the Secretary of

Defense (OSD) did not find problems with respect to selection for grades 0-6 and below. Further, counsel's comments regarding changes to procedures for field grade selection boards and the board president's role are without merit, as are his assertions regarding the illegality of special selection boards (SSBs). Also while counsel offers his personal opinion regarding what the Selection Board Secretariat was to brief or not brief the selection boards regarding the controlled OER system, the formal charge from the Secretary of the Air Force addressed the context in which board members were to evaluate OERs prepared during the controlled OER system vis-a-vis the whole person concept.

A complete copy of the evaluation is attached at Exhibit C.

The Chief, Appeals and SSB Branch, AFMPC/DPMAJA, reviewed the application and recommends denial on the basis of timeliness; if considered, deny due to lack of merit. They have analyzed applicant's record and her record speaks for itself. Specifically, the first controlled report is abbreviated, therefore, there are no ratings on the back of the form. Applicant received a "3" in October 1976 and July 1977 as a captain. she selected to major with these reports in her records; there were five reports on top of the controlled OERS. She had three other reports prior to the lieutenant colonel board. The majority of applicant's peers received "firewall" reports with the front marked all the way to the right. Also the controls on the rating were only on the final indorser. It is doubtful that applicant would have been promoted without the control OERs in her records. Applicant has not established the controlled OER System was illegal or that the controlled OERs were the sole cause of her non-selection for promotion. Applicant has not established the promotion process is flawed, nor has she submitted evidence to substantiate any of her allegations, nor has she provided any statements from supervisors or other

officials in the rating chain to support the ratings of record are in error.

A complete copy of the evaluation is attached at Exhibit D.

The Chief, Officer Evaluation Programs Branch, AFMPC/DPMAJE reviewed the application and states that the controlled OER system was not illegal or unfair. The system was designed to differentiate and identify the best qualified officers for promotion in a competitive system and it did. Regarding the link between time-in-grade (TIG) and ratings, management understood that as officers approach promotion eligibility for each grade, the percent of top block ratings usually increase. Today, as it was 16 years ago, it is reasonable to expect that more senior, experienced, and mature officers in competition with less experienced contemporaries would receive a higher percentage of top block ratings. The ratings awarded to an officer is far more likely a function of actual performance rather than the TIG perception. However, perceptions of the latter spread quickly and ultimately could not be ignored. Air Force senior leadership addressed these perceptions because it became evident the controlled OER system negatively influenced the officer corps, morale and motivation. Although the system met most of its intended goals, it increased anxiety and loss of self esteem among some officers. As a result of the concern for morale, the Air Force concluded that a change was desirable and in 1978 the Chief of Staff agreed to terminate the rating control limitations. However, these changes were not made because the system operated illegally or treated officers unjustly. Applicant presents no conclusive evidence to support her allegations of unfair treatment and the case should be denied because of the elapsed time between the appeal and the alleged wrong, and secondly, because applicant has tailed to prove the existence of any error or injustice.

A complete copy of the evaluation is attached at Exhibit E.

The Chief Retirements and Separations Division, AFMPC/DPMARSP reviewed the application and states that it appears there were no injustices or irregularities that occurred with applicant's nonselection for promotion or subsequent separation. Further, they do not concur with applicant's request for remission of any of her compensation upon separation. If the request for retirement is approved, recoupment of separation pay should be made. They also nonconcur with the request for continuous service credit. There is no provisions of law to change member's retirement date to a future date, thereby awarding service credit for unearned service. This remedy goes well beyond the tenure allowed other majors at the time - 20 years. This remedy would grant tenure of from 25-30 years or longer, an option not available to other majors. Should the AFBCMR set aside the nonselections to lieutenant colonel, the "make whole" remedy should then be to treat them as other majors in like circumstances with regard to their retirement options. The option available to such others was retirement upon attainment of 20 years of total active federal commissioned service. Applicant retired with 20 years of service, thus, no remedy is warranted. Therefore, they recommend denial.

A complete copy of the evaluation is attached at Exhibit F.

The staff Judge Advocate AFMPC/JA, reviewed the application and recommends denial on the basis of timeliness. They state: that applicant has failed to file within the allotted time period and has not satisfactorily explained her failure. It would not be in the interest of justice to excuse the failure. It is also their opinion that applicant, on the merits, has failed to present relevant evidence of any error or injustice warranting relief.

A complete copy of the evaluation is attached at Exhibit G.

APPLICANT'S REVIEW OF AIR STAFF EVALUATION:

Counsel reviewed the Air Staff evaluations and reiterates his position that applicant was the victim of a systemically inequitable and illegal evaluation system. The error was compounded by the actions and inactions of officer selection boards that violated applicant's legal and regulatory entitlement to he considered for promotion on a fair and equitable basis. Applicant was intentionally uninformed and misinformed concerning the fairness and equity of the controlled system/selection boards. Counsel states that promotability is not the issue before the AFBCMR, rather it is the removal of the nonselections for promotion and the retirement/separation. The provisions of law and directive were violated by the Air Force selection board procedures used when applicant was considered for promotion. Applicant asks the Board to set aside the results of the tainted selection boards. Applicant's timely and legal access to information she was entitled to by law was violated by numerous Air Force acts of fraudulent concealment. Fraudulent concealment circumvents an Air Force time bar defense.

In support of applicant's request, counsel submits an eight page rebuttal with five attachments.

Counsel's complete response is attached at Exhibit I.

EXAMINER'S NOTE: Counsel cites attachments in his rebuttal which he indicates were attached to DD Form 149, however, there were no attachments, with the exceptions of the 11 page brief, to the DD Form 149.

FINDINGS AND CONCLUSIONS BY THEE BOARD

1. The application was not filed within three years after the alleged error or injustice was discovered, or reasonably could have been discovered, as required by Section 1552, Title 10, United States Code (10 USC 1552), and Air Force Regulation 31-3. Although the applicant asserts a date of discovery which would, if correct, make the application timely, the essential facts which gave rise to the application were known to applicant long before the asserted date of discovery. Knowledge of those facts constituted the date of discovery and the beginning of the three-year period for filing. Thus the application is untimely.

2. Paragraph b of 10 USC 1552 permits us, in our discretion, to excuse untimely filing in the interest of justice. We have carefully reviewed applicant's submission and the entire record, and we do not find a sufficient basis to excuse the untimely filing of the application. The applicant has not shown a plausible reason for delay in filing, and we are not persuaded that the record raises issues of error or injustice which require resolution on the merits at the time. Accordingly, we conclude that it would not be in the interest of justice to excuse the untimely filing of the application.

3. The applicant's case is adequately documented and it has not. been shown that a personal, appearance with or without counsel will materially add to our understanding of the issue(s) involved. Therefore, the request for a shearing in not favorably considered.

DECISION OF THE BOARD:

The application was not timely filed and it would not be in the interest of justice to waive the untimeliness. It is the decision of the Board, therefore, to reject the application as untimely.

The following members of the Board considered the application in Executive Session oil 18 September 1995 under provisions of AFR 31-3:

Mr. Walter A, Willson, Panel Chairman
Mr. Gregory H. Petkoff, Member
Ms. Martha Maust, Member

The following documentary evidence was considered

Exhibit A. DD Form 149, dated 5 Jun 93, w/atch.
Exhibit B. Applicant's Master Personnel Records
Exhibit C. Letter, AFMPC/DPMAB, dated 3 Nov 94.
Exhibit D. Letter, AFMPC/DPMAJA, dated 10 Nov 94.
Exhibit E. Letter, AFMPC/DPMAJE, dated 29 Nov 94.
Exhibit F. Letter, AFMPC/DPMARSP, dated 2 Feb 95.
Exhibit G. Letter, AFMPC/JA, dated 2 Mar 95.
Exhibit H. Letter, AFBCMR, dated 27 Mar 95.
Exhibit I. Counsel's response, 22 Apr 95, w/atchs.

WALTER A. WILLSON
Panel Chairman

DEPARTMENT OF THE AIR FORCE
Headquarters United States Air Force
Washington, D.C.

Reply to
Attn of: JAG February 26, 1992

Subject: AF/CV Comments Regarding Promotion Board Report (10 USC 617)

To: AF/DPXOP (Major Brown)

1. This is in response to your request for our comments regarding the subject as above.

2. It is important to note at the outset that there is no provision of law which specifically requires each member of a promotion board to personally review and score the record of each officer that is being considered by the board. Despite this, the issue regarding reports of selection boards convened under the authority of 10 USC § 611(a) has been of recurring interest because of section 617(a) which requires that:

> Each selection board ... shall submit to the Secretary of the military department concerned a written report, signed by each member of the board, . . . certifying (1) that the board has carefully considered the record of each officer whose name was furnished it ... and (2) in the opinion of the majority of the members of the board, the officers recommended for promotion by the board are best qualified for promotion ...

The language was enacted as part of the Defense Officer Personnel Management Act (DOPMA), P.L. 96-513. We

have noted previously that the HASC report (97-141) on the subsequent DOPMA Technical Corrections Act, P.L. 97-22, specifically references panels as a type of administrative subdivision of selection boards.

3. Based on the above, the conclusion is inescapable that, at the time DOPMA was enacted, the Congress was aware of the existence of promotion board panels and had no problem with them. Because the Congress was aware of panels and their use as administrative subdivisions of promotion selection boards, they had no expectation that each board member would review each and every record considered by the board. Furthermore, the specific language of section 617(a) speaks to the corporate board and not to individuals. There is no requirement that individual members "carefully consider the record of each officer whose name is before them". This is a requirement that is levied on the corporate board. In essence, each member is required to certify that the corporate board has considered each record. This same logic applied to the follow-on requirement that the board members certify that, in their opinion, the recommended officers are "best qualified for promotion." The members are not compelled to arrive at this opinion by an individual examination of each record, although they may do so. Rather, based on their overall participation in the board's deliberations, which includes the random of assignment of personnel files to panels and procedures which insure that the range of scores each panel reports are basically identical, the members are in a position to honestly certify that the process in which they participated properly identified, based on the record before them, those officers who were best qualified for promotion.

4. In providing the comments above, we are applying a cardinal rule of statutory consideration which is to base our interpretations on the plain language of the law and to harmonize statutory provisions, if possible, where there are

apparent conflicts. In instant case, we have already made the point that the plain language of the law does not compel board members to score each record. Where a conflict exists, which in this case is more imagined than real, our interpretation harmonized the use of panels, a fact known to Congress at the time with reporting requirements of section 617.

EVERETT G. HOPSON
Chief, Personnel Law Division
Officer of the Judge Advocate General

OFFICE OF THE ASSISTANT SECRETARY
DEPARTMENT OF THE AIR FORCE
WASHINGTON DC 20330-1000

2 Dec 1998

MEMORANDUM FOR EXECUTIVE DIRECTOR, AIR FORCE BOARD FOR CORRECTION OF MILITARY RECORDS (AFBCMR)

SUBJECT: LARY, George F., Docket Number 88-00782

I have carefully reviewed the facts and circumstances of subject application for the correction of military records. I agree with the AFBCMR panel that applicant's consideration by special selection board (SSB for the calendar year (CY) 1986B and the regularly scheduled 1987 board were conducted in accordance with applicable regulation and law. I do not, however, agree with the panel that consideration by SSB for the CY 1986A board was contrary to law.

The panel bases its recommendation for corrective action on its interpretation of 10 USC 612(b): "No officer may be a member of two successive selection boards convened under section 611(a) of this title for the consideration of officers of the same competitive category and grade." Applicant was considered by the regularly scheduled CY 1987 major board which convened September 28, 1987. Immediately following and as the result of an earlier AFBCMR directive, he received SSB consideration for the CY 1986A board. Presumably some of the same officers sat on both boards; and this, in the panel's opinion, was contrary to the statutory prohibition of any officer serving on two successive boards.

This issue has been examined in a number of earlier applications. Legal reviews have consistently supported the

SSB procedures, and earlier Board decisions have deferred to those legal opinions. This deference is justified, I believe, by the legislative history of the relevant statutory provision:

> "Subsection 612(b) would restrict officers from serving on successive boards for the same competitive category and grade. The intention is to give officers not selected by a promotion board a fresh consideration by different board members. It is recognized, however, that in some cases an officer not selected by a promotion board may be considered for the second time by a board other than the next successive board for the same competitive category and grade. This can happen after removal from a promotion list, as the result of Secretarial correction board action, or as the result of other similar combination of events. It is not intended that the provisions of subsection (b) would bar an officer who may have served on the first board from serving on a later board in such cases as long as the officer does not serve on two successive boards."
>
> Report No. 96-1462, page 67
> Report of the Committee on Armed Services
> 96th Congress, 2d Session

Additionally, the selection board process has safeguards to preclude personal knowledge about a candidate from influencing the decision of the board. Members do not select or nonselect candidates -- they simply score records by secret ballot -- selectees are determined by rank order during regularly scheduled boards, and ranking against selectees and nonselectees during SSB consideration. In each case the Selection Board members are simply advised that all candidates are eligible for promotion, the actual selectees and nonselectees are not revealed to the members.

Significant variances in record scoring are routinely identified, and the record returned to panel members for reconciliation. The board president also reviews the records to ensure consistency in record scoring.

After consideration of this statement of the intent of the Congress, the facts and circumstances of applicant's case, the safeguards used in the selection process, and prior decisions of the AFBCMR on this specific issue, I do not find sufficient evidence of error or injustice to warrant a decision that would summarily dismiss the results of a properly convened and conducted special selection board.

Accordingly, the application is denied.

KAREN R. KEESLING

Assistant Secretary of the Air Force
(Manpower and Reserve Affairs)

AIR FORCE PROMOTION BOARD PROCESS

- BOARD COMPOSITION
  - 15 - 25 MEMBERS (LINE)
    - MIRRORS ELIGIBLE POPULATION - MAJCOM, SPECIALTY, JOINT, RESERVE APPOINTED AS REQUIRED
  - MBRS DIVIDED INTO PANELS -- FIVE MBRS PER
    - 3 - 5 PANELS (2 JOINT REPS ON LAST COL'S BD)
- BOARD LENGTH - 10 DAYS
  - 1200 RECORDS PER PANEL (3500-6000 TOTAL RECORDS)
- SCORING PROCEDURES
  - TRIAL RUN EXERCISES - STANDARDIZE SCORING, DEVELOP CONSISTENCY
  - SCORING 6 - 10 IN 1/2 PT INCREMENTS
  - SECRET BALLOT UNLESS SPLIT OCCURS
  - SPLIT - 1 1/2 POINTS OR GREATER – RCDS DISCUSSED W/IN PANEL, SCORES RESOLVED
  - "GRAY AREA" RESOLUTION – RCDS RESCORED, ORDER OF MERIT RESOLVED W/IN PANEL

ARMY PROMOTION BOARD PROCESS

- BOARD COMPOSITION
  - •• 17 MEMBERS
  - •• REPRESENTATIVES FROM EACH SPECIALTY -- MINORITY, JOINT, RESERVE REPRESENTATION
- BOARD 4 WKS IN LENGTH
  - •• 4,000 – 7,000 RECORDS
- SCORING PROCEDURES
  - •• EACH BD MBR SCORES EACH RCD - 1- TO 6+
    - ••• SECRET VOTE
  - •• "SPLIT VOTE" - - NO PROCEDURAL RULE
    - ••• BD PRES SETS GUIDELINES
  - •• ORDER OF MERIT "GRAY AREA" RESOLUTION - RCD DISCUSSED/RESCORED

NAVY PROMOTION BOARD PROCESS

- BOARD COMPOSITION
  - ••13 MEMBERS
    - •• REPRESENTATIVES FROM EACH SPECIALTY – MINORITY JOINT, RESERVE REPRESENTATION
- BOARD 2-4 WKS IN LENGTH
    - •• 700- 1,100 RECORDS
- SCORING PROCEDURES
    - •• EACH BD MBR REVIEWS PERCENTAGE OF RCDS
      - ••• BRIEFS RCDS TO ALL BD MBRS
    - •• ALL 13 MEMBERS VOTE USING A PROMOTABILITY SCORE (0-100) CALLED A "CONFIDENCE FACTOR"
      - ••• COMPUTER DERIVES AVERAGE WHICH PRODUCES ORDER OF MERIT
    - •• "GRAY AREA" RESOLUTION -- RCD IS DISCUSSED AND RESCORED

MARINE PROMOTION BOARD PROCESS

- BOARD COMPOSITION
  - 9 - 13 MEMBERS
  - REPRESENTATIVES BASED ON SPECIALTIES -- MINORITY, JOINT, RESERVE REPRESENTATION
- BOARD 4 - 6 WKS IN LENGTH
  - 700 - 1500 RECORDS
- VOTING PROCEDURES
  - EACH BD MBR REVIEWS PERCENTAGE OF RCDS
    - BOARD MBRS HAVE LIMITED "BRIEF" ON ALL ELIGIBLES
    - UNANIMOUS VOTE (IN SOME CASES A MAJORITY) - YES/NO - REQUIRED
  - GRAY AREA RESOLUTION - DISCUSSION/ REVOTE

Relevant Statutory Provisions

10 U.S.C. § 611(a) (1999):

Under regulations prescribed by the Secretary of Defense, the Secretary of the military department concerned, whenever the needs of the service require, shall convene selection boards to recommend for promotion to the next higher permanent grade ... officers on the active-duty list in each permanent grade from first lieutenant through brigadier general in the Army, Air Force, or Marine Corps and from lieutenant (junior grade) through rear admiral (lower half) in the Navy.

10 U.S.C. § 616(c):

A selection board convened under §611(a) of this title may not recommend an officer for promotion unless -
(1) the officer receives the recommendation of a majority of the members of the board; and
(2) a majority of the members of the board finds that the officer is fully qualified for promotion.

10 U.S.C. § 617(a):

Each selection board convened under §611(a) of this title shall submit to the Secretary of the military department concerned a written report, signed by each member of the board, containing a list of the names of the officers it recommends for promotion and certifying (1) that the board has carefully considered the record of each officer whose name was furnished to it under §615 of this title, and (2) that, in the opinion of a majority of the members of the board, the officers recommended for promotion by the board are best qualified for promotion to meet the needs of the armed force concerned among those officers whose names were furnished to the selection board.

Department of Defense Directive 1320.9

September 18, 1981

SUBJECT: Management of Officers on the Active Duty List by Competitive Category

References: (a) Title 10, United States Code
(b) Public Law 96-513, "The Defense Officer Personnel Management Act," December 12, 1980

A. PURPOSE

This Directive establishes policies, under sections 611(a), 618, and 621, reference (a), (1) that prescribe the circumstances under which selection boards are convened to recommend officers for promotion to higher grades and (2) that govern the establishment of competitive categories for the promotion of active duty officers.

B. APPLICABILITY AND SCOPE

1. The provisions of this Directive apply to the Military Departments. The term, "Military Services," as used herein, refers to the Army, Navy, Air Force, and Marine Corps.

2. Its provisions cover commissioned officers on the active duty list in the permanent grades of first lieutenant through brigadier general in the Army, Air Force, and Marine Corps, and lieutenant (junior grade) through commodore in the Navy.

C. DEFINITIONS

1. Selection Board. A board of commissioned officers convened under section 611(a), reference (a), to evaluate and recommend qualified officers on the active duty list for promotion to a higher grade.

2. Active Duty List. A single list for the Army, Navy, Air Force, or Marine Corps (required to be maintained under 10 U.S.C. 620) which contains the names of all officers of that armed force, other than the officers described in 10 U.S.C. 641, who are serving on active duty.

3. Commissioned Officer. A commissioned officer, other than a commissioned warrant officer.

4. Competitive Category. A separate promotion category established by the Secretary of a Military Department under section 621, reference (a), for specific groups of officers whose specialized education, training, or experience, and often relatively narrow utilization, make separate career management desirable.

D. POLICY

1. Selection Boards. Selection boards to recommend commissioned officers for promotion to the permanent grades of captain through major general in the Army, Air Force, or Marine Corps and lieutenant through rear admiral in the Navy, shall be convened by the Secretary of the Military Department concerned as circumstances warrant in time to fulfill Service needs in that competitive category in the higher grade. Separate selection boards shall be convened for each competitive category and grade as established under the provisions of section 621, reference (a).

a. Centralized Selection. To ensure fairness in the promotion selection process and a balanced appraisal of the needs of the Military Service concerned, a single board shall he convened to consider all eligible officers in the same grade and competitive category for promotion to grades above captain in the Army, Air Force, or Marine Corps; or lieutenant in the Navy, except that:

(1) The Secretary of each Military Department may establish procedures to limit the number of officers to be considered by a central board from below the promotion zone to those officers who are determined to be exceptionally well qualified.

(2) The Secretary of each Military Department may establish procedures to limit the number of officers to be considered by a central board for selection for promotion to the grade of brigadier general or commodore to those officers determined to be exceptionally well qualified.

b. Concurrent Boards. Selection boards convened for different competitive categories or grade may be convened concurrently when practicable at the discretion of the Secretary of the Military Department concerned.

c. Selection Board Reports.

(1) When more than one selection board is convened to recommend officers in different competitive categories or grades for promotion, the reports of the promotion selection boards under 10 U.S.C. 617 may be consolidated into a single package for submission as prescribed under 10 U.S.C. 618.

(2) Reports of selection boards convened in accordance with 10 U.S.C. 611(a) shall, when forwarded to the Secretary of Defense, contain the recommendation of the

Secretary of the Military Department concerned and the names of all officers recommended for promotion. The name of any officer whom the board determines in accordance with 10 U.S.C. 617(b) should be required to show cause for retention on a active duty under the provisions of Chapter 60, reference (a), may not be included in the report transmitted to the Secretary of Defense. The Secretary of each Military Department shall develop procedures for appropriate action on any such recommendation

2. Competitive Categories The career development and promotion consideration of certain groups of officers whose use is narrow due to specialized education, training, or experience shall be managed in relation to the requirements of the officer category concerned in order to ensure the most efficient use of unique resources in the various grades in the Military Departments.

a. Transition to Public Law 96-513 (reference (b)). The Secretary of the Military Department concerned may reestablish those competitive categories that existed by law or policy on September 14, 1981. This authority shall expire on December 31, 1981.

b. New Competitive Categories. New competitive categories other than those provided for under paragraph D.2.a. shall be established by the Secretary of the Military Department concerned upon review and concurrence of the Assistant Secretary of Defense (Manpower, Reserve Affairs, and Logistics). Requests must contain the information required by enclosure 1.

E. RESPONSIBILITIES

The Secretaries of the Military Departments shall:

1. Administer the policies prescribed herein.

2. Recommend policy changes to the Secretary of Defense through the Assistant Secretary of Defense (Manpower, Reserve Affairs, and Logistics).

F. EFFECTIVE DATE AND IMPLEMENTATION

This Directive is effective September 15, 1981. Forward two copies of implementing documents to the Assistant Secretary of Defense (Manpower, Reserve Affairs, and Logistics) within 120 days of the effective date.

Frank C. Carlucci
Deputy Secretary of Defense

Enclosure - 1
Request to Establish Competitive Category

Air Force Regulation 36-89 (1981), Chapter 2

2-1. Announcement of the Promotion Program:

a. The promotion of an officer to first lieutenant is made on completion of specified periods of time and service []. Since a board recommendation is not needed, it is not necessary to announce the promotion criteria each year.

b. The promotion of an officer to the grade of captain through colonel requires selection by a central selection board. ... Since the eligibility criteria differs for each competitive category from year to year, HQ AFMPC/MPCJAB specifies exact requirements each time it makes an announcement. As of the date of notification, the names and dates of ranks of the junior and senior officers in the promotion zone will be provided for each competitive category. Additional information will also be provided regarding eligibility for consideration below the promotion zone and above the promotion zone. ...

2-2. Appointment of Boards:

a. The Secretary of the Air Force appoints and convenes central selection boards.

* * *

2-3. Composition of Boards:

a. Selection boards must have a minimum of five officers who are on the active duty list and are serving in a higher grade than the grade of the officers to be considered by the board. All members must be serving in a grade higher than major.

b. No member may serve on two successive boards for the same grade if the second board considers any officer in the same grade and competitive category considered by the previous board.

c. If Reserve of the Air Force officers are considered, the membership of the board must include at least one Reserve officer.

d. Board membership must include at least one officer from each competitive category being considered. ...
e. The president of a board should be serving in a grade equal to or higher than that shown in table 2-1.

2-4. Information Provided to Selection and Nomination Boards:

a. Central Selection Boards Are Provided:

(1) The number of officers in each competitive category to be considered.

(2) The maximum number of officers in each competitive category under consideration that the board may recommend for promotion.

(3) The names of all officers to be considered in each competitive category.

(4) The Officer, HQ USAF Selection Record Group (selection folder) for each officer who is being considered. ...

(5) Information relating to the needs of the Air Force for officers having particular skills.

(6) Any other information and guidance the board may need to properly perform its functions as long as such information is not prohibited by another directive.

* * *

2-5. Letters to Selection Boards:

(a) Letters from a person other than the officer eligible for consideration are not authorized. Also, letters are not permitted for use by nomination boards.

(b) An officer eligible for consideration may send a letter to the board to arrive not later than the date the board convenes. ...

2-6. Whole Person Concept. Board members use the whole person concept to subjectively assess each eligible officer's relative potential to serve in the next higher grade. The whole person concept includes such factors as performance,

leadership, professional competence, breadth of experience, job responsibility, academic and professional education, and specific achievements.

2-7. Oath Administered to Members of Selection and Nomination Boards. Board members must take an oath to perform their duties without prejudice or partiality, having in view both the special fitness of officers and the efficiency of the Air Force.

2-8. Report of Board Proceedings:

a. Each board submits a written report to the Secretary of the Air Force signed by each member. The report certifies that the board carefully considered the records of each officer whose name was provided the board, and that in the opinion of a majority of the members, the officers recommended for promotion are both best qualified and fully qualified to meet the needs of the Air Force.

b. In addition to providing a list of officers recommended for promotion, each selection board will list the names, as appropriate, of all officers considered for promotion whose record, in the opinion of a majority of the board members, indicates that the officers should be required to show cause for retention on active duty. []

2-9. Approval of Board Proceedings:

a. The Secretary of the Air Force acting for the President, is the approval authority for central selection board proceedings.

* * *

2-10. Announcement of Central Selection Board Results. HQ AFMPC/MPCJAB determines when each list will be announced and sends advance copies to [major commands and personnel offices] before the public release date. Public release will not be made until the report of a selection board is approved by the Secretary of the Air Force.

2-11. Disclosure of Board Proceedings:
a. How board members scored on any particular record may not be disclosed (AFR 12-30). However, information on the number of officers considered and selected, how the board was organized, the general procedures it followed, and the number of board members and their grades may be disclosed. Board scores are internal working papers, are exempt from disclosure, and are destroyed as soon as the board proceedings are approved.

* * *

2-12. Notification of officers Selected for Promotion:

a. First Lieutenant. Each officer's commander notifies him or her of the projected effective date, and advises the officer to assume the grade on that date unless otherwise directed. Each officer should be notified at least 30 days before the effective date.

b. All Other Grades. Each officer's commander notifies the officer of his or her selection on the day before the public release date, or as soon afterward as practical. The officer may be notified orally or in writing.

(1) Each officer selected for promotion to captain and each medical and dental corps officer selected for promotion to major and above is advised of the date he or she may assume the higher grade.

(2) All other officers selected for promotion to a grade above captain are advised that they will be promoted when their promotion sequence number is included in the monthly increment announced by HQ AFMPC/MPCAJB.

2-13. Notification of Officers Failed of Selection for Promotion. Each officer's commander notifies the officer of his or her nonselection on the day before the public release date, or as soon thereafter as possible. Officers not selected for promotion to captain, major, or lieutenant

colonel must be notified in writing. Officers not selected for promotion to colonel may be notified orally.

2-14. Active Duty Service Commitment (ADSC). Each officer promoted to major and above (except medical and dental corps officers) incurs a 2-year ADSC beginning on the effective date of the promotion. (See AFR 36-51.) Officers selected for promotion to grades above captain are required to sign a Statement of Understanding (attachment 1) within 5 workdays after public release of the list. The statement acknowledges the 2-year ADSC if the promotion is accepted and affords the selectee the opportunity to indicate his or her intention of accepting or declining the promotion.

2-15. Retirement Grade Restrictions:

a. For promotions resulting from boards held after 14 September 1981, officers must serve 3 years after to effective date of promotion to lieutenant colonel or colonel to qualify for voluntary nondisability retirement in that current grade unless a waiver is granted by the President. Majors must serve 2 years (same as the ADSC) before they can voluntarily retire for nondisability retirement in that grade. ... Officers selected for promotion to grades above captain are required to sign a Statement of Understanding of these retirement restrictions (attachment 1).

b. For promotions resulting from boards held prior to 15 September 1981, officers must serve 2 years after the effective date of promotion to lieutenant colonel or colonel to qualify for voluntary nondisability retirement in that grade unless a waiver is granted by the Secretary of the Air Force. ...

2-16. Declination of Promotion:

a. An officer selected for promotion to a higher grade is considered to have accepted the promotion on the effective date of the promotion unless he or she had taken action to decline it. An officer may decline a promotion at

any time up to 2400 hours of the day before the effective date of promotion. Declinations signed after 2400 hours of the day preceding the effective date will not be accepted.

b. An officer who desires to decline a promotion must sign three copies of a Declination of Promotion Statement (attachment 2) and send all copies to the CBPO.

c. The name of an officer who declines promotion remains on the promotion list.

d. An officer who submits a declination statement and later decides to accept the promotion may withdraw the declination statement.

(1) If the effective date of promotion has not passed, the officer submits a letter to HQ AFMPC/MPCAJB stating that he or she desitres to withdraw the declination statement and accept the promotion. Officer will then be promoted as originally scheduled provided sufficient service retainability has been obtained.

(2) If the effective date of promotion has passed, the officer must submit a written request through his or her [major command] to withdraw the declination statement. If all levels of command recommend approval of the request, officer will be promoted with an effective date, DOR, and position on the ADL as of the date the withdrawal request is received at HQ AFMPC/MPCAJB.

2-17. Promotion Sequence:

a. For promotion to captain an officer selected the first time he or she is considered is promoted 24 months after his or her DOR as a first lieutenant. An officer, selected the second or a subsequent time he or she is considered, is promoted on the first day in which promotions are made from the promotion list that contains the officer's name.

b. Each officer, other than medical or dental corps, on a recommended list to major or above will have his or her name placed on a single promotion list for that competitive category in order of seniority (see paragraph 1-3c). Subject to senate confirmation and established grade ceilings officers

on a promotion list will be promoted when additional officers in that grade and competitive category are needed. Officers are promoted in order by promotion sequence number (line number). HQ AFMPC/MPCAJB sends an increment message (MINIMIZE included) to CBPOs each month listing the promotion sequence numbers of officers to be promoted to grades above captain.

c. For promotion of a medical or dental corps officers to a grade above captain:

(1) An officer selected "In-the-Promotion Zone (IPZ)" is promoted effective and with DOR based on the anniversary of the DOR that made him or her eligible for consideration.

(2) An officer selected the second, or a subsequent time he or she is considered (Above-the-Promotion Zone) is promoted with an effective date and DOR prior to those promoted "In-the-Promotion Zone (IPZ)".

(3) An officer selected "Below-the-Promotion Zone (BPZ)" is promoted with an effective date and DOR subsequent to those promoted "In-the-Promotion Zone (IPZ)".

2-18. Promotion Orders. HQ AFMPC/MPCAJB announces each promotion in Department of the Air Force (DAF) orders.

a. Promotion orders are printed from a machine-produced roster and are amended only to correct an error in the last name, SSAN, DOR, or effective date.

b. If an officer on a promotion order dies or separates from the service before the effective date of promotion, the part of the order pertaining to the promotion of that officer is without effect.

c. HQ AFMPC/DAA distributes promotion orders to arrive at the CBPO with 10 days after the effective date. Address a request for missing orders to HQ AFMPC/DAA, Randolph AFB TX 78150, for order published withing 2

years of the date of reqeust. If the orders were published more than 2 years before the date of request, write to HQ AFMPC/MPCDOB, Randlph AFB TX 78150. Include name, SSAN, grade to which promoted, and the order number, if available.

2-19. Posthumous Promotions:

a. A deceased officer may be promoted posthumously. The commander must state that he or she did not initiate and did not plan to initiate a propriety of promotion action against the officer. The officer must have been either:

(1) A second lieutenant eligible for promotion within 3 months, or

(2) A first lieutenant or above who had been recommended for promotion by a selection board.

b. To initiate a posthumous promotion, the immediate commander sends the request and the statement (referenced above) through the CBPO Promotion and Testing Unit to the officer's MAJCOM OR SOA. The MAJCOM or SOA then requests HQ AFMPC/MPCAJB to publish promotion orders. HQ AFMPC/MPCC sends a letter with copies of the orders to the officer's next of kin. No financial entitlements accrue as a result of a posthumous promotion. NOTE: Posthumous promotions should be processed as soon as possible after death. Immediate telephone contact with AFMPC is desired.

2-20. Promotion Ceremonies. Appropriate ceremonies to publicly recognize the importance of changing insignia are encouraged. Such ceremonies will not be held prior to the effective date of promotion. EXCEPTION: Promotion pin-on ceremonies may be held on the last duty day before the effective date of promotion if the effective date falls on Saturday, Sunday, or a holiday. The officer being recognized is to be advised that although the pin-on ceremony is being held early, the promotion does not become effective until the date on the promotion order and

that the early ceremony does not affect the member's pay, seniority, or entitlements. Promotion propriety actions may be initiated subsequent to the early pin-on ceremony but before the effective date of promotion.

(2)

Supreme Court, U.S.
FILED
AUG 10 1999
OFFICE OF THE CLERK

No. 98-1979

In the Supreme Court of the United States

WALTER D. SMALL, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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Solicitor General
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QUESTION PRESENTED

Whether 10 U.S.C. 616 or 617 bars the Air Force from using a panel system in conducting the evaluative and deliberative phases of selection boards which recommend officers for promotion.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals in *Small* (Pet. App. A1- A12) is reported at 158 F.3d 576. The orders of the court of appeals granting in part petitioner's petition for rehearing and amending its opinion (Pet. App. A14-A15) are not yet reported. The order of the court of appeals in *Neptune* (Pet. App. A13) is not yet reported. The initial opinion of the United States Court of Federal Claims in *Small* (Pet. App. A20-38, A39-A55) and its opinion on reconsideration are reported at 36 Fed. Cl. 43 and 37 Fed. Cl. 149. The opinion of the United States Court of Federal Claims in *Neptune* (Pet. App. A56-A70) is reported at 38 Fed. Cl. 510. The records of proceedings before the Air Force Board for

Correction of Military Records (Pet. App. A71-A130) are unreported.

JURISDICTION

The judgment of the court of appeals in *Small* was entered on October 14, 1998. A petition for rehearing was granted in part on March 12, 1999 (Pet. App. A14-A15). The judgment of the court of appeals in *Neptune* (Pet. App. A13) was entered on November 2, 1998. A petition for rehearing was denied on March 12, 1999 (Pet. App. A16). The combined petition for a writ of certiorari was filed on June 10, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Pursuant to the military's statutory "up or out" personnel system, an officer twice non-selected or passed over for promotion to the next higher grade is generally subject to mandatory separation. 10 U.S.C. 630-637. The Secretary of the military department concerned convenes "selection boards" to recommend officers for promotion. 10 U.S.C. 611. A selection board "may not recommend an officer for promotion unless– (1) the officer receives the recommendation of a majority of the members of the board; and (2) a majority of the members of the board finds that the officer is fully qualified for promotion." 10 U.S.C. 616(c). A selection board is also required to "submit to the Secretary of the military department concerned a written report, signed by each member of the board, containing a list of the names of the officers it recommends for promotion and certifying (1) that the board has carefully considered the record of each officer * * * and (2) that, in the opinion of a majority of the members of the board, the officers recommended for promotion * * * are best qualified for promotion"

among the officers considered by the board. 10 U.S.C. 617(a).

Since at least 1965, the Air Force has convened officer selection boards that are comprised of subordinate panels. Pet. App. A2, A49, A58; Gov't C.A. Br. 32 (*Small*). During the evaluative and deliberative phases of the selection board proceedings, each panel is assigned a proportionate share of the candidates' personnel records to rank in order of merit based upon the composite score awarded to each record by the panel. Pet. App. A3, A49-A50, A58. Based upon the promotion rate previously selected by the Secretary (see 10 U.S.C. 622), each panel's "best qualified" officers, who are picked by their hierarchical placement within the panel's order of merit, are recommended for promotion. Pet. App. A3-A4, A50-A51, A58-A59.

2. Petitioners were mandatorily retired from the Air Force, as majors, pursuant to 10 U.S.C. 632, after having served on active duty for 20 years and failed upon several consecutive occasions to be selected for promotion to lieutenant colonel. Pet. App. A73, A88-A89, A114-A115, A122-A123.[1] Petitioners filed applications with the Air Force Board for Correction of Military Records (AFBCMR) challenging their promotion pass-overs because, *inter alia*, the Air Force used a panel system in conducting officer promotion boards in alleged violation of 10 U.S.C. 616(c) and 617(a). Pet. App. A71-A82 (Small), A86-A110 (Neptune), A113-A118 (Hoogstra), and A121-A128 (Lorenzen). The AFBCMR denied relief. *Id.* at A83-A84 (Small), A110-A111

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[1] We are advised by the Air Force that petitioners were permitted, at the discretion of the Secretary, to remain on active duty following their initial two pass-overs to fulfill their 20-year pension eligibility requirements.

(Neptune), A119 (Hoogstra), and A129-A130 (Lorenzen).

The United States Court of Federal Claims affirmed in *Small*, Pet. App. A20-A38, and amended its opinion upon reconsideration after permitting petitioner to conduct further discovery, *id.* at A39-A55. The court also affirmed in *Neptune*, which comprised the consolidated appeals of petitioners Neptune, Hoogstra and Lorenzen. *Id.* at A56-A70.

3. The Court of Appeals for the Federal Circuit affirmed both decisions. Pet. App. A1-A13.[2] The court of appeals rejected petitioners' contention that the Air Force's use of panels in officer selection board proceedings violated 10 U.S.C. 616(c) and 617(a). The court explained that those provisions "do not contain any specific methodology that the selection board must use in carrying out its deliberative process." Pet. App. A9. Then, according deference under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), the court of appeals concluded that the Air Force's panel system reflected a permissible interpretation of Sections 616(c) and 617(a). Pet. App. A8-A9.[3]

The court of appeals denied petitioners' motions for reconsideration, Pet. App. A14-A16, except that it granted petitioner Small's motion for the limited purpose of deleting a paragraph in its opinion concerning

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[2] The two cases were submitted to the same panel and treated as companion cases. The court issued an opinion in *Small* and affirmed in *Neptune* based upon its decision in *Small*. See Pet. App. A1-A12, A13.

[3] The court of appeals also found non-justiciable petitioner Small's contention that his superior officers impermissibly relied on a prior pass-over in determining the level of management to endorse his officer effectiveness report. Pet. App. A10-A12. That contention is not before this Court.

its power to review the merits of petitioner Small's non-selection for promotion, *id.* at A15.

ARGUMENT

1. Petitioners argue (Pet. App. A13-A14, A16-A19, A22-A23) that the Air Force's use of panels violates 10 U.S.C. 616(c), which requires that an officer recommended for promotion receive the recommendation of a majority of the members of a selection board, and 10 U.S.C. 617(a), which requires the selection board to submit a list of the recommended officers to the Secretary concerned and certify that the board has carefully considered each officer's record and that a majority of the board agrees that the list of recommended officers are the best qualified for promotion. In petitioners' view, Sections 616(c) and 617(a) mandate that each board member consider every candidate's record after which the board must reach a majority consensus and certify that the recommended officers are the best qualified for promotion. Those contentions are incorrect, and do not warrant this Court's review.

Sections 616(c) and 617(a) "do not contain any specific methodology that the selection board must use in carrying out its deliberative process." Pet. App. A9. Similarly, "nothing in the plain language" of either statute "requires first-hand knowledge on the part of the deliberators of an officer's record. All that is required is a numerical showing that more than half of the board members approved or disapproved of the matter before them." *Ibid.* Accordingly, the court of appeals properly concluded that "[a] review of a selected number of individuals by sub-panels who use common and identifiable criteria is an efficacious and equitable means to establish the final rankings that are

in fact approved by a majority of the members of the board." *Id.* at A10.[4]

Moreover, 10 U.S.C. 615(b) specifically authorizes "the Secretary of the military department concerned" to furnish to a selection board "such * * * guidelines as may be necessary to enable the board to properly perform its functions." The court of appeals thus correctly concluded that the Air Force has the discretion to employ panels as an administrative mechanism through which a selection board conducts its deliberations and reaches its majority consensus.

Petitioners similarly are mistaken in contending (Pet. 20-21) that use of panels is inconsistent with the requirement under 10 U.S.C. 612(a)(3) that a selection board which considers a Reserve officer include at least one Reserve officer as a member. Petitioners are not Reserve officers, and they in any event do not contend that any selection board which failed to select them for promotion failed to have a Reserve officer as one of its members. As the legislative history of Section 612 makes clear, Congress "intend[ed] that the requirement for one [R]eserve member apply only to the selection board as a whole and not to each panel or other administrative subdivision" of the selection board. See *Fluellen* v. *United States*, No. 94-537C, 1999 WL 428037, at *8 (Fed. Cl. June 23, 1999) (citing H.R. Rep. No. 141, 97th Cong., 1st Sess. 12 (1981)).

2. Petitioners also argue (Pet. 25-27) that the use of panels conflicts with DoD Directive No. 1320.9 (Sept.

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[4] Petitioners contend (Pet. 6-7, 27-29) that the Air Force promotion system is inequitable. Apart from their contention that the Air Force's use of panels violates Sections 616(c) and 617(a), however, petitioners do not contend that any of their pass-overs violated any specific statute, regulation or other provision of law.

18, 1981), which provides that officers should be selected for promotion under a "centralized" system in which officers compete only against their peers. See also Pet. 21-22 (citing legislative history to 10 U.S.C. 621). Nothing in DoD Directive No. 1320.9, or any other provision of law, however, restricts the Air Force's ability to carry out a selection board's review of officers eligible for promotion through the use of panels. Petitioners moreover have adduced no evidence that any of them competed against any officers outside their competitive category. See, *e.g.*, Pet. App. A55.

3. Petitioners also challenge (Pet. 22-24) the practice whereby selection board panel members simultaneously register their approval or disapproval of the list of recommended officers and sign the board report to the Secretary that contains the requisite certification under Section 617(a). Neither Section 616 nor Section 617, however, prohibits that practice or even addresses the manner in which a selection board reaches its majority consensus or reports its majority findings. The court of appeals therefore correctly concluded that "using the signing of the Board Report as a means for the members to both express their approval of the recommended candidates and make the required certification is permissible under the statutory scheme." Pet. App. A10.

Contrary to petitioners' contention, the fact that a panel member's signature on the board's report reflects the member's approval of the list of recommended candidates does not result in the impermissible disclosure of the member's personal views and deliberations, in

violation of 10 U.S.C. 618(f).[5] The existence of each member's signature on the report merely reflects a final unanimous vote by the board that it considers the list of recommended candidates to be fully and best qualified for promotion. The report itself does not reflect any internal deliberations of the board.[6]

4. Petitioners further argue (Pet. 14-16) that the court of appeals violated their Due Process rights when the court failed explicitly to address their contention that panel members unlawfully sign the board's report under Section 617(a) "in blank" with no list of candidates attached. There is no basis for concluding, however, that the court of appeals did not consider petitioners' contention. As the court of appeals observed, petitioner raised many arguments, ranging "from issues regarding the policy of centralized review in the promotion process to basic principles of governing society." Pet. App. A10. The court of appeals explained that it "considered these arguments and [found] them unpersuasive." *Ibid.*

In any event, petitioners' underlying contention—that members may not sign a blank sheet of paper that is ultimately attached to the board's report—is without

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[5] Section 618(f) provides that "proceedings of a selection board * * * may not be disclosed to any person not a member of the board."

[6] Petitioners similarly err in suggesting (Pet. 24) that the use of panels is unworkable because a member's dissent as to the results of the selection process under Section 616(c) would result in the convening of a new selection board in order to obtain a unanimous board certification under Section 617(a). We are advised by the Air Force that a board member is permitted, next to his certification under Section 617(a), to register his disapproval, if any, of the slate of officers whom the Board ultimately will recommend for promotion.

merit. Section 617(a) requires the board to submit to the Secretary of the Air Force a report containing a list of recommended candidates, and petitioners do not contend that the prescribed list was not provided to Secretary along with the board's report. Nothing in the statute addresses, much less bars, a board member's executing his signature on a blank document to which the report, along with the list of candidates, is later attached.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 98-1979

In The Supreme Court of the United States

WALTER D. SMALL,
LARRY W. NEPTUNE,
WILLIAM R. HOOGSTRA, AND
ALICE D. LORENZEN,
Petitioners,

v.

UNITED STATES,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PETITIONERS' REPLY TO THE BRIEF IN OPPOSITION

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IN THE SUPREME COURT OF THE UNITED STATES

No. 98-1979

WALTER D. SMALL, *et al.*, Petitioners

v.

UNITED STATES OF AMERICA, Respondent

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

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PETITIONERS' REPLY TO THE BRIEF IN OPPOSITION

1. Respondent Misstates the Central Issue

Francis Bacon noted that "a false and improper Imposition of Words strangely possesses the Understanding, for Words absolutely force the Understanding, and put all Things into Confusion." Francis Bacon, *Novum Organum Scientarum*, Section II, Aphorism VI. In this case, an "improper Imposition of Words" has transformed vital issues about the meanings of majority "recommendation," majority "finding," and "certification" in a statutory board context, and the authority of the Department of Defense to interpret federal statute, into an irrelevant discourse about the Air Force's theoretical right to use panels. [1]

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[1] See Brief in Opposition [Opp.] i (sole issue is "Whether 10 U.S.C. 616 or 617 bars the Air Force from using a panel system...."); 5 ("Petitioners argue ... that the Air Force's use of panels violates 10 U.S.C. 616(c)... and 617(a)"); 6 ("Petitioners are similarly mistaken in contending ... that use of panels is inconsistent with ... 10 U.S.C. 612(a)(3).... Petitioners also argue ... that the use of panels conflicts with DoD Directive No. 1320.9....").

The issue is not whether panels are prohibited; indeed, Petitioners have no objection to the abstract proposition that military departments may incorporate panels into their promotion board processes. Properly stated and understood, the issue is whether the Air Force may **use** panels and implement other procedures [2] in a manner that plainly violates express federal laws. A fitting analogy is the congressional committee system. If secret votes took place within Senate committees comprised of a minority of the Senators and a majority of the Senators were required to assent in blank to the committees' undisclosed results, the process would be patently unconstitutional. The issue would not be the Senate's right to have committees, which is indisputable. The issue, instead, would be the Senate's use of committees in a manner that precludes majority consensus.

The Petitioners' position is that Sections 616(c) and 617(a) mandate exactly what they say. Members must make recommendations and findings. Recommendations and findings by "a majority of the members of the board" are required before any officer may be promoted. Finally, "each member" must sign a report certifying that the recommended officers are the best qualified "in the opinion of a majority of the members of the board." These statutory mandates are not satisfied merely by the members' signatures on a blank paper when no member knows which officers are being recommended and there are no recommendations or findings (by either the individual members, a majority of any panel, or a majority of the board) to be approved and/or certified.

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[2] E.g. Pet 6-7 (nondescript scores not tantamount to recommendations or findings by the individual members; cumulative scoring does not insure majority consensus even within panels; blind signature process and behind-the-scenes manipulations preclude knowing certification of recommended officers). Contrary to Respondent's assertion (Opp. 6 n 4), Petitioners **do** make contentions apart from their contention that the "use of panels violates Sections 616(c) and 617(a)" because these problems would exist even if panels were not used.

Some level of knowledge on the part of the members about the candidates' qualifications is implicit in the statutory scheme. The members must consider the candidates' records in order to make recommendations and findings about them. [3] The members then must know whom they are recommending in order to make a certification to the Secretary. The statutory scheme is flouted when a majority of the members have **no** knowledge whatsoever of a majority of the candidates' records and **none** of the members know who will ultimately be recommended. [4]

Petitioners' position is also that Department of Defense Directive [DoDD] 1320.9 (1981) mandates exactly what it says – "centralized review" [5] by a "single board" to "insure fairness in the promotion selection process and a balanced appraisal of the needs of the Military Service concerned." Pet. App. A144. Respondent admits that "each panel's 'best qualified' officers, who are picked by their hierarchical placement within the panel's order of merit, are recommended for promotion." Opp. 3. [6] In fact, neither a fair

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[3] But see Pet. 18, 19 n. 16 (citing Morgan v. United States, 298 U.S. 468, 481 (1936), for proposition that decision maker must decide but may do so on basis of summaries compiled by others).

[4] Respondent maintains that first-hand knowledge is not required and that signature of a "blank sheet of paper" is not barred as long as the Secretary eventually receives the later-attached list. Opp. 5-6, 8-9. But see 10 U.S.C. § 617(a) (requiring the submission of a report **certifying** that the recommended officers on an accompanying list are, "in the opinion of a majority of the members of the board, ... best qualified for promotion."). Respondent's position would condone ignorant and unknowing certifications by military officers to their civilian superiors.

[5] The Senate Armed Services Committee would ultimately adopt the same phrase. S. Rep. No. 102-482, 102nd Cong., 2nd Sess. (1992) at 9 ("statutory centralized selection process" contemplates that officers "compete against their peers throughout the Air Force").

[6] This admission comports with the statement of a former Assistant Secretary of the Air Force about the uninvolvement of board members in the actual identification of the recommended officers (Pet. App. A 135), and supports Petitioners' position that recommendations and findings by "a majority of the members of the board" are never achieved.

process nor a balanced appraisal of the service's needs is possible if promotion decisions are made at the panel level and each panel considers only a small fraction of the eligible officers, rather than the full range of skills and qualifications offered by the entire pool of candidates.

2. Respondent's Attempt to Reconcile its Position with the Mandate of DoDD 1320.9 is Unavailing

Respondent argues that the Air Force promotion board process complies with DoDD 1320.9 because nothing therein restricts the use of panels. Opp. 6-7. [7] That stilted reading of DoDD 1320.9 will not withstand scrutiny.

DoDD 1320.9 explicitly provided for "centralized selection" by "a single board." Pet. App. A144. This express requirement is directly at odds with the Air Force's use of autonomous panels. Yet the court of appeals found the "policy of centralized review" to be "unpersuasive" and deferred instead to the contrary practices of the Air Force. The court of appeals clearly deferred to the wrong agency. To foster consistency in the application of national statutes, *certiorari* should be granted to provide guidance on identifying the proper administrative agency to which Chevron deference [8] is due.

3. Respondent's Attempt to Reconcile its Position with the Mandate of Sections 266(a) and 612(a)(3) is Unavailing

Petitioners argued that "centralized review" by a single board was implicit in the larger statutory scheme, including 10 U.S.C. §§ 266(a) [9] and 612(a)(3) that require a Reserve member on every board considering Reservists. Pet. 20-21. Respondent cites H.R. Rep. No. 141, 97th Cong., 1st

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[7] Petitioners do not complain that they "competed against any officers outside their competitive category." They cite DoDD 1320.9 for its superior and controlling interpretation of Sections 616(c) and 617(a) as requiring "centralized" review.

[8] Chevron, U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984).

[9] Section 266(a) was renumbered Section 12643(a) in 1994.

Sess. (1981), as quoted in Fluellen v. United States, No. 94-537C, 1999 WL 428037 (Fed. Cl. June 23, 1999), for the opposite proposition. Opp. 6. [10] In fact, H.R. Rep. No. 141 and Fluellen are compelling evidence that the Air Force's unique use of panels violates Sections 616(c) and 617(a).

The plaintiff in Fluellen was a Reserve officer who claimed to have been denied the protection afforded by Sections 266(a) and 612(a)(3) when the Air Force appointed one Reserve member to his promotion board, dissected that board into numerous autonomous panels, and then assigned the Reserve member to one panel where he considered only those candidates whose records happened to be randomly distributed to that panel. Citing Small's holding that knowing review and the personal participation of board members is not required by Sections 616 and 617, the court concluded that "the personal participation of a reserve officer on a panel considering a reserve officer for promotion is not required by 10 U.S.C. §§ 266(a) and 612(a)(3)." Fluellen v. United States, supra 1999 WL 428037 at *8.

The result of the court of appeals' interpretation of Sections 616 and 617 is that Reserve members may be walled off from considering the very Reserve candidates that Congress intended them to protect. [11] The impermissibility of such an interpretation is readily apparent from a recent decision by the Court of Appeals for the District of Columbia in which a similar interpretation of federal statute was found to be "absurd" and "rather astonishing." Cummock v. Gore, 1999 U.S. App. LEXIS 13605, *24 (D.C. Cir. 1999) (it is absurd to argue that government can

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[10] Petitioners do not claim that they were entitled to consideration by Reserve promotion board members. Rather, they cite Sections 266(a) and 612(a)(3) as evidence of legislative intent that promotion consideration be centralized rather than compartmentalized.

[11] Dilley v. Alexander, 603 F.2d 914, 923 (D.C. Cir. 1979) (Section 266(a) imposes a "nondiscretionary safeguard[] designed to ensure Reserve participation in decisions affecting Reserve members."); Doyle v. United States, 599 F.2d 984, 994 (Ct. Cl. 1979).

"appoint an individual to an advisory committee and then wall that individual off from the committee's operations").

H.R. Rep. No. 141 acknowledged the use of "panel[s] or other administrative subdivision[s]" and disclaimed any need for a Reserve member to serve on every panel. This history, far from supporting Respondent's position, proves that Congress did not intend for panels to operate autonomously **within** promotion boards. When a panel operates as an "administrative subdivision" **of** a board, there is no need for a Reserve member to serve on every panel. Instead, the Reserve member's participation in a centralized review process (where "a majority of the members of the board" make recommendations and findings about the candidates) insures that each Reserve candidate receives the full measure of protection envisioned by Sections 266(a) and 612(a)(3). Accord S. Rep. No. 102-482, supra, at 9 ("statutory centralized selection process") and DoDD 1320.9 ("centralized selection" by "a single board").

In sum, when Section 616(c) is construed according to its plain meaning and DoDD 1320.9 is given its full effect, Congress' statutory protections for Reservists are upheld. By contrast, when Small's unnatural construction of Section 616(c) is adopted and when DoDD 1320.9 is ignored, Congress' statutory protections for Reservists are rendered meaningless and ineffective.

Sections 616(c) and 617(a) are part of a comprehensive and interconnected statutory scheme. As shown by Fluellen, the court of appeals' errors are not limited to those two provisions. Indeed, it is easy to foresee Small's sanctioning of ignorant and unconscientious board consideration affecting special selection boards (10 U.S.C. § 628), Reserve promotion boards (10 U.S.C. Chapters 1403 and 1407), continuation boards (10 U.S.C. § 637), early retirement boards (10 U.S.C. § 638), and a host of others – in **all** the military services and perhaps civilian contexts as well. *Certiorari* should be granted to prevent the

proliferation of an error that will affect tens of thousands of citizens each year.

4. Respondent's Position *Vis-à-vis* Section 618(f) is a "Catch 22"

The court of appeals held that the members both reach the required majority consensus and make the required certification by the single act of signing the board report. Pet. App. A10. Petitioners have argued that this is an unworkable interpretation of Sections 616(c) and 617(a) because, *inter alia*, it destroys the confidentiality of board proceedings guaranteed by Section 618(f). Pet. 23-24. Respondent denies that the members' signatures impermissibly disclose their "personal views and deliberations" because each signature "merely reflects a final unanimous vote by the board that it considers the list of recommended candidates to be fully and best qualified for promotion." Opp. 7-8. Respondent goes on to report Air Force assurances that members are permitted to note their disapproval of the officers who will ultimately be recommended. Id. at 8 n 6. [12]

Respondent cannot have it both ways. Reaching majority consensus about candidates **is** the board's deliberative process. The signature process is not merely a "final" vote – it is the **only** vote and, according to the court of appeals, the actual mechanism by which majority consensus is derived. As such, each individual member's expression of approval or disapproval of the officers being recommended for promotion is the essence of that "member's personal views and deliberations." If the signature process is the defining deliberative act that yields the majority consensus required by statute, as the court of appeals held, then the Air Force interpretation of Sections 616(c) and 617(a) is impermissible because it causes a violation of Section 618(f). If the signature process is a mere non-deliberative formality, as Respondent now argues, then

[12] These "assurances" are, of course, unsubstantiated since no evidence of them was before the Court of Federal Claims or the Federal Circuit.

the majority recommendation and finding requirements of Section 616(c) are unfulfilled and the Air Force interpretation is manifestly impermissible.

5. Respondent's Reliance upon 10 U.S.C. § 615(b) is Unavailing

10 U.S.C. § 615(b) permits a Secretary to provide "guidelines" to a selection board. Respondent argues that the court of appeals was justified in concluding that that provision afforded the Air Force discretion to employ panels. Opp. 6. This argument is unavailing for three reasons.

First, the court of appeals did not rely upon Section 615(b) and did not reach the conclusion now attributed to it by Respondent. Second, the Secretary's guidelines to the promotion boards in this case [13] did not address any of the procedures at issue. Third, any such guidelines would have been patently inconsistent with DoDD 1320.9.

6. Respondent and the Court of Appeals Have Rewritten the Rules that Congress and DoD Affirmatively and Specifically Enacted

The court of appeals opined that Sections 616(c) and 617(a) "do not contain any specific methodology that the selection board must use in carrying out its deliberative process" and deferred to the Air Force's interpretation of those statutes. Pet. App. A9-10. Respondent relies repeatedly upon the lack of a "specific methodology" to essentially maintain that any promotion board process would pass statutory muster. Opp. 4, 5, 7, 9. Unfortunately, Respondent's summary recitation of the court of appeals' application of Chevron does nothing to address the basic propriety of that action and also avoids many of the other reasons why *certiorari* should be granted.

Respondent's position ignores the plain meaning of the words "majority," "recommendation," "finding," and "certify." It also ignores the fact that statutes are the work of human hands and must be read in the context of human

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[13] Small v. United States, Fed. Cir. No. 97-5074, *Joint Appendix* 144-50.

experience. Parsing a comprehensive statutory scheme and then examining each piece in a vacuum leads to incongruous and often unexpected results. In this case, for example, no one would reasonably expect Congress to expressly require that the members know something about the officers being recommended because some knowledge is implicit in the making of findings and recommendations. Nor would one reasonably expect Congress to include a provision expressly requiring that the members have knowledge of the facts they are certifying because knowledge is essential to the act of certification. [14]

This is not a case where "Congress' silence or ambiguity has 'left a gap for the agency to fill.'" Stinson v. United States, 508 U.S. 36, 44 (1993), quoting Chevron, 467 U.S. at 842-843. Congress might have been silent about the military's abstract discretion to have panels. Congress was **not** silent, however, about the need for centralization in the promotion process. Pet. 16-19. Nor was Congress silent about the fundamental prerequisites of valid promotion board operation – recommendations and findings by "a majority of the members of the board" and then a unanimous certification of that majority consensus. The meaning of Sections 616(c) and 617(a) is plain on the face of the statutes and this meaning is confirmed by the relationship between the statutes (Pet. 18), the unworkability of the certification process approved by the court of appeals (Pet. 22-24), the statutory scheme as a whole (Pet. 20-21), the legislative history (Pet. 21-22), the emasculation of Section 616(c) that results from compressing everything into Section 617(a)'s certification process (Pet. 19-20), and DoDD 1320.9 (Pet. 24-26). "There is a basic difference between filling a gap left by Congress' silence and rewriting rules that Congress has affirmatively and specifically enacted." Mobil Oil Corp. v. Higginbotham, 436 U.S. 618, 625 (1978). Because that basic difference has been forgotten in this important case

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[14] See Fed. R. Civ. P. 11 (certification of counsel).

involving the integrity of the officer promotion system, *certiorari* should be granted to rectify the error.

CONCLUSION

The Petition for Certiorari should be granted.

Respectfully submitted,

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